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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

No. [REDACTED] 27

THE STATE OF SOUTH DAKOTA AND THE PUBLIC  
UTILITIES COMMISSION OF THE STATE OF  
SOUTH DAKOTA,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellees.*

AND

No. [REDACTED] 28

THE STATE OF MINNESOTA AND THE MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

## MOTION TO AFFIRM.

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Appellees.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

No. 620.

THE STATE OF SOUTH DAKOTA AND THE PUBLIC  
UTILITIES COMMISSION OF THE STATE OF  
SOUTH DAKOTA,

*Appellants,*

vs.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellees.*

AND

No. 633.

THE STATE OF MINNESOTA AND THE MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

*Appellants,*

vs.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

## MOTION TO AFFIRM.

Appellees, The Atchison, Topeka and Santa Fe Rail-  
way Company, The Pennsylvania Railroad Company, and  
Pennsylvania Company, move that the judgment of the  
District Court be affirmed on the ground that the questions  
presented on the two above-entitled appeals are so un-  
substantial as not to need further argument.



## STATEMENT AND ARGUMENT.

This motion is addressed to two appeals, one on behalf of the State of South Dakota and the Public Utilities Commission of that state (together referred to as South Dakota) and the other on behalf of the State of Minnesota and the Minnesota Railroad and Warehouse Commission (together referred to as Minnesota). Both South Dakota and Minnesota support the position of the Minneapolis & St. Louis Railway Company (the Minneapolis), appellant in No. 552, *The Minneapolis & St. Louis Railway Co. v. United States, et al.*

Although their arguments take a slightly different form, the jurisdictional statements of South Dakota and Minnesota raise questions which have already been raised in the jurisdictional statement of The Minneapolis. These have been fully dealt with in the Motion to Affirm filed by these appellees in No. 552 under date of December 30, 1958. Accordingly, we will refer to that motion\* for the statement of the case and the argument generally, commenting only briefly on certain aspects of the arguments made by South Dakota and Minnesota in their jurisdictional statements.

Both South Dakota and Minnesota contend—as did Minneapolis—that in approving the acquisition of control of Toledo, Peoria & Western Railroad Company (Western) by Santa Fe and Pennsylvania, the Interstate Commerce Commission failed to give adequate consideration to the competitive effects of such acquisition on the Minneapolis and the area it serves. Particular stress is laid on the possibility that Minneapolis might be forced to abandon

\* The Motion to Affirm filed by The Atchison, Topeka and Santa Fe Railway Company, The Pennsylvania Railroad Company and Pennsylvania Company in No. 552 will be referred to hereinafter as "Motion to Affirm."

certain branch lines in South Dakota and Minnesota. The short answer to these arguments is that the Commission considered the competitive effects of the proposed acquisition not only generally but particularly with respect to the Minneapolis and found that the volume of traffic handled by Minneapolis and the other intervening carriers would not be materially affected. *See* Report of the Commission (Minneapolis J. S., pp. 75-82, 83-85, 90). This finding is fully supported by the evidence. *See* Motion to Affirm, pp. 26-27.

South Dakota's contentions with respect to the anti-trust laws assume that control of Western is to be acquired by a "Pennsylvania-Santa Fe combine" and that this is in effect "a gigantic railroad merger." But joint control of a carrier by two of its connections is in no sense a unification or merger of the acquiring roads. Moreover, the assumption that this is a merger overlooks the fact that Western is a bridge line between the east and the west and that the proposal is for joint control by the Pennsylvania, an eastern railroad, and the Santa Fe, a western railroad. Under such joint control Western would not be a part of either the Santa Fe or the Pennsylvania systems but would continue as a separately operated carrier. And, as the Commission found, the checks and balances inherent in such control by an eastern and a western carrier would protect Western's other connections, such as Minneapolis, from discriminatory service and solicitation policies. *See* Motion to Affirm, pp. 26-27.

Minnesota suggests that acquisition of Western by Santa Fe and Pennsylvania would "dry up" the Peoria gateway as far as the Minneapolis is concerned and thus force Minnesota to rely more heavily on the Chicago gateway. The Commission is said to have ignored this. On the contrary, the Commission found that the plan of the Pennsylvania to place Effner, where it connects with

Western, on a solicitation parity with Chicago, would make additional traffic available for solicitation by the Minneapolis through Peoria (Minneapolis J. S., p. 78). Moreover, the argument assumes that Western's line is the Peoria gateway when, in fact, the Minneapolis interchanges more traffic through Peoria with the Nickel Plate and the New York Central than with Western. Minnesota's argument also overlooks the fact that the Pennsylvania receives valuable traffic via Western from the Minneapolis and therefore would not permit Western to be operated in such a way as to lose that traffic.

The contention that Minneapolis was not accorded a comparative hearing is fully answered in the Motion to Affirm at pages 12-17. In its jurisdictional statement, Minnesota argues that the application of the Minneapolis was not considered on its merits because the Minneapolis had no contract to purchase the stock of Western. Minnesota also argues that the dismissal of the Minneapolis application indicates that it was not considered on its merits. These arguments simply ignore what the Commission said and did. The following excerpt from its report makes it entirely clear that the lack of a contract did not prevent full consideration on the merits and also explains the reason for dismissal of the Minneapolis application:

"\* \* \* In determining consistency with the public interest and the national transportation policy we are not shackled in a case like this by the first application filed, if there is presented for our consideration at the same time a different proposal which but for the situation created by the first application might easily be accomplished. The public interest is the prime consideration, and in making that determination we must have regard for all relevant factors.

"Consistent with the foregoing, we have carefully considered the evidence and arguments presented to

lating to both the applications before us and conclude upon the basis of the whole record, and as reflected by this report, that the application of the Santa Fe and the Pennsylvania should be granted subject to the conditions previously alluded to herein. With our approval of that application, the possibility of the Minneapolis' acquiring the Western's stock is eliminated and its application becomes moot. Accordingly, the application of the Minneapolis will be dismissed. (Minneapolis J. S., pp. 93-94.)

Minneapolis suggests that this case should have been decided on the relative advantages of the acquisition to the two competing applicants. But this is by no means the prime consideration in determining the public interest. The interests of the applicants and their stock holders are not the public interest. The concept is a broad one, which embraces all parts of the public affected by the transaction; the interests of shippers using the services of Western, of the communities dependent on Western, of Western's employees and of the other railroads involved, are included within it. *Detroit T. & I. R. Co. Control*, 275 I. C. C. 455, 488 (1950); *Watson Bros. Transp. Co., Inc.*, 57 M. C. C. 745, 758 (1951); *Florida East Coast Ry. Co. Reorganization*, 267 I. C. C. 295, 325 (1947). And see *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 25 (1932). The review of the findings at pages 7-12 of the Motion to Affirm shows that all aspects of the public interest were fully considered by the Commission in arriving at its final determination.

**CONCLUSION.**

Neither South Dakota nor Minnesota presents a substantial question for consideration by this Court. The motion to affirm should, therefore, be granted.

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Appellees.*

January 29, 1959.

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NOTICE TO  
AFFIRM ON BEHALF  
OF THE STATE OF  
ILLINOIS

NO 12

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FEB 2 1959

JAMES R. BOWMAN, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

No. [REDACTED]

27

No. [REDACTED]

28

THE STATE OF SOUTH DAKOTA AND THE PUBLIC  
UTILITIES COMMISSION OF THE STATE OF  
SOUTH DAKOTA,

THE STATE OF MINNESOTA AND THE MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA.

## MOTION TO AFFIRM ON BEHALF OF THE STATE OF ILLINOIS.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958.

---

**No. 620.**

**No. 633.**

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THE STATE OF SOUTH DAKOTA AND THE PUBLIC  
UTILITIES COMMISSION OF THE STATE OF  
SOUTH DAKOTA,

THE STATE OF MINNESOTA AND THE MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA.

---

**MOTION TO AFFIRM.**

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The State of Illinois, appellee in both of the above-entitled cases, pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, respectfully moves to affirm on the ground that the Decision of the Court below is wholly correct, in accord with an relevant authority and that the questions raised by appellants, are so unsubstantial as not to require further argument.



**STATEMENT.**

The arguments employed by South Dakota and Minnesota in an effort to establish the substantiality of the questions presented are unique. The arguments are based upon the assumption that both the Commission's report and the decision of the District Court should be ignored in determining whether the questions presented are substantial. Thus it is asserted that the District Court's decision, affirming the Commission's report, should be ignored because the Court did not actually mean what it said in its opinion since it is "plain" that the Court really disagrees with the Commission's decision (Minn. J. S. p. 15). Appellants assert that the Commission's report, moreover, should be similarly ignored because the language employed in the report is meaningless as an indication of what the Commission did. South Dakota and Minnesota argue that the Commission's decision is based upon a "shocking prejudgment" of the case (S. D. J. S. p. 6) and that the Commission "did not observe its own statement" (Minn. J. S. p. 12).

The nature of the assumptions underlying South Dakota's and Minnesota's arguments renders their position so untenable as to hardly require answering. We feel somewhat constrained to give dignity by replying to an argument which presupposes that neither the language of the report of the administrative agency nor the opinion of the Court reviewing the administrative order accurately reflect the basis for those decisions. There is no basis for any assumption other than that the Commission acted in good faith, that its statements as to the consideration it gave to the evidence are true and that the District Court did, in fact, affirm the Commission's decision on the basis of the relevant law and the record which was before it.

## ARGUMENT.

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### I. THE MINNESOTA JURISDICTIONAL STATEMENT.

#### 1. Minnesota Branch Lines:

Minnesota's argument concerning its branch lines is manifestly no more than a reiteration of Minneapolis' claims of traffic diversion. Minnesota says that such diversion would occur primarily through the loss of the traffic moving via Minneapolis between Nemo and Peoria (p. 6).<sup>2</sup> Minnesota says that the evidence relating to the diversion of this traffic "stands undisputed" and that the Commission failed to make findings with respect to it (p. 7).

The Commission's extensive findings dealing specifically with Minneapolis' contentions respecting the Peoria-Nemo traffic, covering three full paragraphs in its report, provide a complete answer to Minnesota's argument and no purpose would be served by extending the discussion beyond these findings (App. B, Mpls. J. S. pp. 76-77).

1. The Railroads referred to herein will be designated as follows: The Atchison, Topeka and Santa Fe Railway Company as "Santa Fe"; The Pennsylvania Railroad Company as "Pennsylvania"; the Toledo Peoria & Western Railroad Company as "Western"; and The Minneapolis & St. Louis Railway Company as "Minneapolis".

2. Numbers in parentheses refer to pages in the Appellants' Jurisdictional Statements; numbers in parentheses preceded by "R." refer to the transcript before the Commission; numbers in parentheses preceded by "H" refer to exhibits received by the Commission.

## 2. The Peoria Gateway:

After first arguing that the Santa Fe-Pennsylvania acquisition will divert traffic from Minneapolis to Western, Minnesota then inconsistently argues, that the Santa Fe and Pennsylvania are attempting to purchase Western in order to "dry up" Peoria (pp. 9-10) and "alleviate the competition" of Western's route between the east and the west (p. 14).

Minnesota's argument is based upon the assumption that the movement of traffic via Western's route and through the Peoria Gateway is really detrimental to the interests of Santa Fe and Pennsylvania. The findings, however, indicate that Santa Fe and Pennsylvania's interest in the Peoria Gateway are based upon their self-interest and the economies of their relationship with Western. No other reason could explain the finding respecting Santa Fe and Pennsylvania's record of cooperation with Western in coordinating schedules and services for the past thirty years (App. B, Mpls. J. S. pp. 60-61). The Commission found that Santa Fe and Pennsylvania are presently "just about as well off" financially where traffic is handled via the Peoria Gateway as via the Santa Fe and Pennsylvania's long-haul to Chicago (App. B, Mpls. J. S. p. 75) and that Santa Fe and Pennsylvania's policies as owners of Western would increase Western's opportunity to secure traffic via the Peoria Gateway which now moves via other gateways (App. B, Mpls. J. S. p. 75), which would also benefit other lines connecting with Western at Peoria (App. B, Mpls. J. S. p. 78).

Minnesota's argument also presumes that control of Western is control of the Peoria Gateway. However, this

3. Minnesota argues that the loss of traffic by Minneapolis will occur "primarily" through the elimination of traffic now moving via St. Louis and Peoria (p. 6). Minneapolis contended that all of this loss would occur by diversion to Western.

is not so. The record shows that there are a number of other western and eastern lines connecting at Peoria interchanging a large volume of traffic which does not move via Western (H-126, H-128). Minneapolis, for example, interchanges more traffic with the Nickel Plate and the New York Central at Peoria than it does with Western (H-128). Minnesota is directly served by several railroads, the Rock Island, Chicago & North Western, Burlington and Minneapolis, which all operate through the Peoria Gateway.

Minnesota's argument also presumes that the Peoria Gateway traffic could be diverted to Santa Fe's and Pennsylvania's own lines. The Commission found to the contrary, Western being only one of several routes through Peoria between the East and the West. Any attempt at suppression of Western would only divert such traffic to any number of available alternative routes via Peoria without benefit to either Santa Fe or Pennsylvania. This fact was conclusively established by a number of shippers who use Western as a bridge carrier, who testified that the self-interest of Santa Fe and Pennsylvania as owners of Western would preclude such suppression of Western's route via Peoria (R. 593, 661-62, 690, 773-74).

### **3. Comparative Hearing:**

Minnesota makes two points in an effort to support its argument that the Commission did not accord Minneapolis a comparative hearing. First, it asserts the Commission decided the case on the fact that Minneapolis did not have an enforceable contract for the purchase of Western stock rather than a comparison of the two applications (pp. 10-12). In order to support its contention, Minnesota was obliged to discredit both the Commission's statements of its function in this proceeding and its discharge of that function as reflected by the extended discussion of the merits of both proposals contained in the report. Minne-

sota argues that the Commission did not do what it said it was going to do and then failed to do what it said it did do, i.e. consider the merits of both applications. Such a position is unworthy of a reply since it assumes bad faith on the part of the Commission. The Commission's conclusion, after considering the merits of both proposals, should be sufficient answer to Minnesota's contention. The report states:

"\* \* \* In determining consistency with the public interest and the national transportation policy we are not shackled in a case like this by the first application filed; if there is presented for our consideration at the same time a different proposal which but for the situation created by the first application might easily be accomplished. The public interest is the prime consideration and in making that determination we must have regard for all relevant factors. Consistent with the foregoing, we have carefully considered the evidence and arguments presented relating to both the applications before us and conclude upon the basis of the whole record, and as reflected by this report, that the application of the Santa Fe and the Pennsylvania should be granted subject to the conditions previously alluded to herein. \* \* \* (App. B. Mpls. J. S. p. 93.)

Second, Minnesota contends that the Commission could not have actually made a comparison of the two proposals since the public interest lies solely with the application of Minneapolis. It takes the position that the public interest lies only in viewing the possible economic advantage to the competing applicants and upon that basis Minneapolis should have been allowed to acquire Western (pp. 13-14). Minnesota admits that the Commission's report recites that a comparison of the applications was made on the merits, but contends that such could not be the fact since the Commission did not adopt the theory of Dr. Nightingale, the consultant and witness for Minnesota (p. 13). Actually,

Minnesota is saying that Minneapolis should have won the case and the fact that it lost is conclusive evidence that the Commission did not consider the applications on the merits.

In determining which of the proposed transactions are more nearly consistent with Section 5(2) of the Act, the Commission has more to consider than the possible benefits to the competing applicants. The interest of the applicants and their stockholders are not the public interest. The concept is a broad one and embraces all parts of the public affected by the transaction, the interest of shippers using the services of Western, the communities dependent upon Western, the employees of Western and the other railroads involved. The evidence showed that the proposal of Minneapolis was based upon the integration of Western into Minneapolis which would afford economic benefits to Minneapolis, but which would destroy Western as a financially strong, independently operated bridge railroad. The destruction of this independently operated railroad should greatly outweigh the economic benefit to the stockholders of Minneapolis. Furthermore, the Commission's finding with respect to the financial stability of Minneapolis indicates that there is no factual basis for Minnesota's argument (App. B, Mpls. J. S., p. 68).

#### **4. The District Court's Decision:**

Minnesota says that the District Court did not mean what it said in its opinion since it is "plain" that the Court really disagrees with the Commission's decision (p. 15). It thereby seeks to dispose of the District Court's decision on the same cavalier basis that it dealt with the Commission's order. We should not be obligated to reply to an argument which assumes that the language used by the Court is meaningless and is not an indication of the Court's decision. We feel that the opinion of the Court which Minnesota concedes to be "an exceptional court", stands as its own answer to such contention.

## II. THE SOUTH DAKOTA JURISDICTIONAL STATEMENT

### 1. South Dakota's Branch Lines.

South Dakota's argument that the Santa Fe-Pennsylvania "combine" would adversely affect the branch lines of Minneapolis in South Dakota again assumes that the only public interest lies in the economic benefit to Minneapolis. The benefit to South Dakota through the creation of a theoretically stronger railroad which could then support the low density marginal branch lines in that State through either the destruction of a strong main line railroad in Illinois or by converting it into a branch line is not necessarily in the public interest. Besides, it is the very function of the Commission to weigh and determine the evidence, and, in this case, the Commission found that the acquisition by Santa Fe and Pennsylvania "will be consistent with the public interest". The record substantiates the finding by the Commission that the status of Western as a strong transcontinental bridge carrier will remain the same through the acquisition by the Santa Fe and Pennsylvania, but would be greatly changed by Minneapolis's ownership. The Commission obviously felt that the preservation of the existing 239 miles of operation in Illinois which Western performs is more in the public interest than the integrity of 154 miles of marginal branch lines of Minneapolis serving the northeastern part of South Dakota.

While completely unrelated to its branch line argument, South Dakota proceeds to attack the intervention of public bodies and the Railway Labor Executives' Association which intervened in support of Santa Fe-Pennsylvania control of Western (pp. 8-9). The significance of the unanimous public support accorded Santa Fe-Pennsylvania acquisition by the municipalities, business associations and shippers along Western's line cannot be dismissed with



the assertion that these interests have been victimized by a Santa Fe public relations campaign since their interests are really jeopardized through the acquisition of Western by Santa Fe-Pennsylvania (p. 9). No reply need be made to this assertion since South Dakota does not indicate how these interests will be hurt by Santa Fe-Pennsylvania control. Furthermore, it would seem that the communities and shippers along Western's line would be better able to judge their own interest than South Dakota. It is further stated by South Dakota that labor would not "suffer" since it is protected by the Washington Job Protection Agreement. This ignores the fact that the interest of Western's employees extend beyond the award of a dole under a job protection agreement.

## **2. The Anti-Trust Effect:**

The argument that Santa Fe-Pennsylvania's control of Western would violate the anti-trust laws is based upon the assumption that the proposed transaction constitutes a "gigantic railroad merger" which "unifies" the operations of Santa Fe and Pennsylvania from "tide water" to "tide water" (pp. 9-10). Joint control of another carrier is not in any sense a merger of the owning roads. This is particularly true where, as here, they are an eastern and a western carrier subject to the checks and balances inherent in such control. The Commission expressed this as follows:

"\* \* \* No greater protection could be afforded to carriers interchanging traffic with Western than to have ownership divided equally between the largest connecting carrier in the east and the largest one in the west. Under this built-in system of checks and balances, it is inconceivable for the Santa Fe to permit impairment of service or discriminatory solicitation with respect to eastern connections, or the Pennsylvania with respect to western ones. \* \* \* (App. B., Mpls. J. S., p. 90).



**CONCLUSION.**

The motion to affirm should be granted. The grounds upon which the District Court's decision rests are fully sustained.

Respectfully submitted,

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AND SHIPYARD ALONG THE RIVER  
AT TOLEDO, RECORDS WESTERN  
PAINTING COMPANY

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**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1958

No. [REDACTED]

No. [REDACTED]

FEB 2 1959

JAMES H. ROBINSON, Clerk

THE STATE OF MINNESOTA AND THE MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION.

THE STATE OF SOUTH DAKOTA AND THE PUBLIC  
UTILITIES COMMISSION OF THE STATE OF  
SOUTH DAKOTA,  
APPELLANTS.

VS.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,  
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

**MOTION TO AFFIRM ON BEHALF OF MUNICIPAL-  
ITIES AND SHIPPERS ALONG THE LINES OF  
TOLEDO, PEORIA & WESTERN RAILROAD  
COMPANY.**

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IN THE  
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OCTOBER TERM, 1958.

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THE STATE OF MINNESOTA AND THE MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

THE STATE OF SOUTH DAKOTA AND THE PUBLIC  
UTILITIES COMMISSION OF THE STATE OF  
SOUTH DAKOTA,  
APPELLANTS,

VS.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION,  
APPELLEES.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

---

**MOTION TO AFFIRM.**

These intervening appellees,<sup>1</sup> pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, move that the judgment of the United States District Court for the District of Minnesota be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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1. The City of Peoria, Illinois; the City of East Peoria, Illinois; the Peoria Association of Commerce; the City of Bushnell, Illinois; the Bushnell Chamber of Commerce; the City of Canton.

## STATEMENT OF THE CASE.

The proceedings below are sufficiently described in the Motion to Affirm filed by these intervening appellees in response to the Minneapolis Jurisdictional Statement which was filed heretofore in this Court in Case No. 552, designated *The Minneapolis & St. Louis Railway Company, Appellant, v. United States of America, Interstate Commerce Commission et al., Appellees.*

## QUESTIONS PRESENTED.

Minnesota's arguments, that the Commission failed to accord Minneapolis a comparative hearing and that the District Court failed to discharge its function of review, merely duplicate the arguments raised by Minneapolis in its Jurisdictional Statement. This is also true of South Dakota's argument that the Commission failed to give appropriate consideration to the competitive effects of the proposed acquisition. These intervening appellees rely

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Illinois; the Canton Chamber of Commerce; the City of LaHarpe, Illinois; the LaHarpe Golden Rule Club; the Village of Lomax, Illinois; the City of Keokuk, Iowa; the Keokuk Chamber of Commerce; the Keokuk Bridge Commission; the City of Warsaw, Illinois; the Warsaw Chamber of Commerce; the City of Forrest, Illinois; the City of Fairbury, Illinois; the City of Gridley, Illinois; the City of Gilman, Illinois; the City of Sheldon, Illinois; the City of Watseka, Illinois; the City of Eureka, Illinois; the Village of Secor, Illinois; the City of Washington, Illinois; and the City of Chenoa, Illinois. All of said appellees will hereinafter be referred to as "these intervening appellees."

2. The interested railroads will be referred to hereafter as follows: Toledo, Peoria and Western Railroad Company as "Western," The Pennsylvania Railroad Company as "Pennsylvania" and The Atchison, Topeka and Santa Fe Railway Company as "Santa Fe."

upon their Motion to Affirm and the Motion to Affirm filed by Santa Fe and Pennsylvania in response to the Minneapolis Jurisdictional Statement as a response to the arguments relating to these questions.

South Dakota and Minnesota have raised three additional questions which may be stated as follows:

1. Did the Commission make adequate findings with respect to the effect of the Santa Fe-Pennsylvania proposal upon the Minneapolis branch lines in South Dakota and Minnesota?

2. Are the findings which were made which relate to the effect of Santa Fe-Pennsylvania's control upon the branch lines, supported by substantial evidence?

3. Did the Commission make adequate findings with respect to the effect of the Santa Fe-Pennsylvania's proposal upon the Peoria Gateway?

## **THE QUESTIONS ARE UNSUBSTANTIAL.**

### **I.**

#### **Minneapolis Branch Lines in South Dakota and Minnesota.**

##### **A. Adequacy of the Findings.**

South Dakota and Minnesota argue that the Commission "disregarded" the effect of Santa Fe-Pennsylvania control of Western upon the Minneapolis branch lines located in those States and in Western Iowa. They contend that the Commission failed to make findings with respect to the "inevitable" detrimental consequences which would result to these lines. South Dakota and Minnesota contend first that the acquisition of Western by Minneapolis is

necessary to insure adequate rail service via its branch lines in those States (S.D. J.S., p. 7; Minn. J.S., pp. 6-7). Secondly, they contend that the traffic of Minneapolis would be diverted under Santa Fe-Pennsylvania control of Western which would result in a loss of gross revenue which, in turn, would result in the "inevitable" abandonment of the Minneapolis branch lines (S.D. J.S., p. 7; Minn. J.S., pp. 6-7). Adequate findings were made by the Commission on both of these issues. These findings indicate that there is no basis for the concern expressed by the States of South Dakota and Minnesota.

The Commission found that Minneapolis is a reasonably prosperous railroad whose financial and physical status has been steadily improving (App. B., Mpls. J.S., pp. 66, 68). It follows, therefore, that no need exists for Minneapolis to acquire Western in order to maintain its branch lines in South Dakota and Minnesota. The Commission found, furthermore, based upon exhaustive evidentiary and subsidiary findings, that the Minneapolis traffic would not be materially affected by Santa Fe-Pennsylvania control of Western (App. B., Mpls. J.S., pp. 75-79). It follows, therefore, that the abandonment of these branch lines would not result from Santa Fe-Pennsylvania's control of Western. The Commission found, moreover, that any diversion of traffic as might occur through the improvement of Western's route under Santa Fe-Pennsylvania control would not jeopardize the maintenance of adequate transportation service by Minneapolis (App. B., Mpls. J.S., p. 74).

These findings effectively dispose of the South Dakota and Minnesota contentions with respect to the impairment of branch-line service. The Commission further found, in placing these contentions in their proper context, that no abandonments were presently contemplated by Minneapolis. It observed, furthermore, that, in any event,



no abandonment could be effected without its approval (App. B., Mpls. J.S., p. 36). Although South Dakota asserts that these findings were not sufficient (S.D. J.S., p. 5); they did provide an adequate disposition of the issue in the light of the previous findings.

### **B. Substantiality of the Evidence.**

Without conceding that adequate findings were made, South Dakota argues that the findings upon which the Commission "ignored" its abandonment claims were not supported by substantial evidence (S.D. J.S., pp. 3, 7). Three basic findings were made which relate to the contentions of South Dakota and Minnesota. Two of them, the finding with respect to the financial stability of Minneapolis and the finding that Santa Fe and Pennsylvania control of Western will not materially divert Minneapolis traffic, are ignored by South Dakota and Minnesota. The third finding, that any diversion which might occur would not jeopardize adequate transportation service is said to be "empty, unexplained, unsupported and erroneous" (S.D. J.S., p. 7).

The finding with respect to the financial stability of Minneapolis is supported by substantial evidence. The earnings record of Minneapolis during the last twenty years and its excellent financial and physical condition are evidence of this (R. 1152). Inefficient operation and excessive debt were the cause of its earlier troubles. *Associated Railways Company Acquisition and Securities*, 228 I.C.C. 277 (1938). It is now almost entirely free from debt (R. 1020). The need to diversify its traffic base to relieve its reliance on agricultural products is said to be necessary to secure its financial security (Minn. J.S., p. 6). But its excellent earnings record in the past several years in the face of an agricultural recession of major

proportions belies these fears (R. 1052; H-44). This finding is corroborated by testimony of South Dakota and Minnesota's witnesses (R. 1681, 1263).

The finding that Santa Fe-Pennsylvania control of Western would not materially affect the traffic of Minneapolis and the finding that such diversion as might occur through the development of Western would not jeopardize adequate transportation of Minneapolis are both based upon the Commission's extensive analysis of the competitive effects of the proposal and its analysis of the specific claims of traffic diversion advanced by Minneapolis. To suggest, as does South Dakota, that the findings are "unexplained" (S.D. J.S., p. 7) is to ignore five full pages of the Commission's report (App. B., Mpls. J.S., pp. 75-79). To suggest, as does South Dakota that the evidence of traffic diversion adduced by Minneapolis is "uncontroverted" (S.D. J.S., p. 7), or as does Minnesota, that it is "undisputed" (Minn. J.S., p. 7) is to ignore the record completely and the detailed findings based on that record relating to each of the categories of traffic included in the Minneapolis diversion "study."

## II.

### **The Peoria Gateway.**

Minnesota argues that the Commission failed to consider and failed to make adequate findings regarding the effect of Santa Fe-Pennsylvania control of Western upon the Peoria Gateway. It contends that control by Santa Fe and Pennsylvania will lead "inescapably to stagnation" of Peoria as a rail gateway to the detriment of Minnesota which relies upon Peoria as a secondary gateway from and to the East (Minn. J.S. pp. 8-10).

This argument is completely groundless. It is based upon the assumption that the movement of traffic via

Peoria is detrimental to the interests of Santa Fe and Pennsylvania. It ignores the record and the findings which indicate that the opposite is true (App. B, Mpls. J.S. pp. 60, 61, 75, 76). The argument assumes, furthermore, that Western is the Peoria Gateway. This ignores the fact that there are several other east-west routes through Peoria which serve Minnesota and do not include Western. These routes are formed by such lines as the Rock Island, Burlington and Minneapolis on the west and the Nickel Plate, the New York Central and the Chicago & Illinois Midland-Baltimore & Ohio on the east (H-4, p. 1; H-11; 771, 773). A substantial volume of traffic moves through Peoria via these routes cutting Western out entirely (H-126, H-128). Any attempted suppression of Western would only divert the Peoria Gateway traffic to these other routes without benefits to either Santa Fe or Pennsylvania (R. 593, 597, 661-62, 773-74, 690).

The argument, moreover, ignores the significance of the participation in this proceeding of the Cities of Peoria and East Peoria and the Peoria Association of Commerce, the interests having the most immediate interest in the development of Peoria as a major rail gateway. South Dakota's suggestion that these intervening appellees have participated in the case because of the "wealth" of the Santa Fe (S.D. J.S. pp. 8-9) is not worthy of a reply.

The Commission, furthermore, made findings which specifically relate to the effect of Santa Fe-Pennsylvania control upon the volume of traffic moving via the Peoria Gateway. The Commission found that under their control Western would have an "increased opportunity" to secure traffic for the Peoria Gateway which now moves via other gateways (App. B, Mpls. J.S. p. 75). This was based in part upon Santa Fe and Pennsylvania policies, as joint

owners, to solicit Lomax and Effner respectively on a parity with the Chicago Gateway. The Commission found that Pennsylvania's policy would divert a portion of its traffic now moving via Chicago to the Peoria Gateway (App. B, Mpls. J.S. p. 78). It found that, because of the increase in the volume of traffic moving via Peoria, Minneapolis would have an opportunity to solicit this added traffic at Peoria (App. B, Mpls. J.S. p. 78). These findings are adequate and are supported by substantial evidence.

### CONCLUSION.

The District Court in holding that the Commission's order was valid was clearly right. It is submitted by these intervening appellees that it is manifest that the questions raised by the appellant on which the decision in this cause depends are so unsubstantial as not to need further argument, and the motion to affirm should be granted.

Respectfully submitted,

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 City of Keokuk, Iowa,  
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In the  
**Supreme Court of the United States**

OCTOBER TERM 1958

No. 

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, A  
MINNESOTA CORPORATION

*Appellant*

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION

*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

**APPELLANT'S BRIEF IN OPPOSITION TO  
MOTIONS TO AFFIRM**

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**In the**  
**Supreme Court of the United States**  
**OCTOBER TERM 1958**

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No. 552

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THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, A  
MINNESOTA CORPORATION

*Appellant*

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION

*Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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**APPELLANT'S BRIEF IN OPPOSITION TO  
MOTIONS TO AFFIRM**

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Four motions to affirm have been filed in this appeal: (1) By United States of America and Interstate Commerce Commission, (2) by the Pennsylvania-Santa Fe partners, (3) by the State of Illinois, and (4) by certain municipalities, shippers, and allied organizations. Because of the need for brevity, no attempt will be made herein to meet all of the arguments advanced in support of those motions in an effort to defend the action of the Commission. Instead, we shall attempt to deal with only some of the most egregious

errors which demonstrate why a full review of this appeal on the merits is needed. At the outset it should be noted that the moving parties have all elected to remain silent on the important questions of the contrast between the motives of the competing applicants and the tainted history of the negotiations of the Pennsylvania-Santa Fe group by which they obtained from Wilmington Trust Company an illegal preference which they now seek to preserve and defend.

## ARGUMENT

### I.

**The Interstate Commerce Commission adopted a false, artificial and meaningless standard by which to test the competing applications; use of that standard deprived appellant of a fair hearing and of a comparative consideration of its application.**

Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. §5(2)(b)) lays down the ultimate standard that an acquisition transaction is to be approved if the Commission finds that it will be consistent with the "public interest". That ultimate standard is given meaning by the National Transportation Policy (49 U. S. C. preceding §1), which provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to *promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers*; to encourage the establishment and maintenance of rea-

sonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.” (Emphasis supplied)

The Commission repeatedly stressed the desirability of “separate and independent management” as the guiding criterion by which the competing applications would be tested. It found that the Pennsylvania-Santa Fe application met that standard and that the Minneapolis application did not. The moving parties in this Court repeatedly stressed that contrast and that standard as valid and correct (*e. g.*, U. S. A.-I. C. C. motion 7; P.-S. F. motion 3, 4, 11).

The standard of “independent management” adopted by the Commission is inherently meaningless and utterly unrelated to any statutory or judicial definition of public interest. Neither the Interstate Commerce Act nor the National Transportation Policy contains a syllable indicating that independent management of small carriers will advance the public interest. Indeed, in this very opinion the Commission itself insisted that carrier control of small lines is desirable and in the public interest (J. St. 89).

Apart from the fact that independent management of a small line collides with the emphasis on economy and efficiency dictated by the statutory statement of transporta-

tion policy is the fact that the standard is wholly illusory. It is arrant nonsense to suggest that the management of Western could be independent with all of the stock concentrated in, and voted, without Commission limitation, by, the powerful Pennsylvania-Santa Fe combination. While Pennsylvania-Santa Fe ownership might leave a "President" in Peoria as against a "Division Superintendent" under Minneapolis ownership, both executives, of necessity, would be subordinate to the owners in every meaningful sense. That incontrovertible fact cuts the ground from under the entire premise upon which the Commission reached its decision. Both the Commission and the District Court declined to recognize or examine that fact.

The Commission's adoption, at the outset, of this artificial standard, necessarily ruled out a comparative hearing. The proper approach for the regulatory agency should have been to catalog the advantages and disadvantages, from the public viewpoint, of each of the two competing applications. Advantages and disadvantages could then have been weighed by appropriate findings. Then the application which improved the public transportation system; facilitated integration and economy, and strengthened railroad carriers in the interests of commerce and the national defense—all objectives expressed in the legislative policy—should have been selected as the application most in the public interest and hence the application to be approved. Instead of pursuing that proper course, what the Commission here did was to decide in advance upon a standard that had no relation to the National Transportation Policy and which only one of the two competing applicants could possibly satisfy.

A so-called comparative hearing in the framework of that advance discriminatory determination is merely an

empty phrase, as the Commission recognized when it said, "With our approval of that [Pennsylvania-Santa Fe] application, the possibility of the Minneapolis' acquiring the Western's stock is eliminated and its application becomes moot" (J. St. 93-94). And that apparently, is the tacit explanation for the refusal of the Commission to make any findings with respect to the undisputed evidence that the Minneapolis application would promote the National Transportation Policy by (a) the integration and elimination of duplicate yard, roundhouse, accounting and other facilities, (b) the effectuation of economies reaching the level of almost 40 per cent of Western's expenses,<sup>1</sup> (c) the elimination of duplicate switching and transfers, (d) the acceleration of schedules and improved service, (e) the dependence of Minneapolis upon, and its self-interest in promoting traffic and industrial development for, the Peoria gateway, (f) the soundness of the purchase price under the Minneapolis program, the effect of which would be virtually to double the earnings of Western, and (g) the advantage of strengthening the 1,400 mile system of Minneapolis and diversifying and improving the density of its traffic. Nor could a truly comparative analysis omit findings on the critical issues of the motivation and economic self-interest of the competing applicants, particularly in view of the undisputed evidence that the successful applicants initiated negotiations for the express purpose

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If the Commission had addressed itself to this question, it would have been required to compare the two applications. The President of the Santa Fe testified that no special study had been made of economies which might be achieved under Pennsylvania-Santa Fe control. The most that he and his large staff could come up with after months of thought, preparation and consultation with Western officers, was that they might trade "ideas" on the subject (Tr. 69-70, 148-49, 153, 1630-31).

of blocking the purchase by Minneapolis and thus foreclosing the competition they might face from a so-called outer-outer belt line around Chicago under Minneapolis control. The Commission's shocking disinterest in the elimination of waste and duplication proposed by Minneapolis, in the added and accelerated service to the public proposed by Minneapolis, and, above all, in the competition-stifling purpose of the Pennsylvania, resulted in a discriminatory and unfair hearing and in a total failure to meet the requirements for findings enunciated by the Administrative Procedure Act. That failure, in turn, necessarily precluded proper judicial review because the reviewing court was not provided with the underpinnings for the Commission's arbitrary conclusion.

Intertwined with the Commission's mistaken emphasis on "independent management" is its discussion of the element of neutrality among connecting carriers. The moving parties maintain that the Pennsylvania-Santa Fe application was to be preferred, because it would preserve neutrality among connecting carriers, whereas the Minneapolis proposal would not. In fact, the Minneapolis testimony was clearly to the effect that service with all carriers connecting with Western would be maintained and improved (Tr. 1274-85, 1289-90). It is true that the successful applicants also testified that they would maintain neutrality with connecting carriers, but they did so, as they testified, in their own self-interest and in fear of retaliation if they adopted any other course (Tr. 221-223, 320, 360). If that economic insurance obtains when the owners are the most powerful carriers, originating the most tonnage in America, how much more effective is it with respect to a small carrier with infinitesimal originations. This economic fact of life is underscored by the powerful influence the

originating carrier has on the routing of traffic.<sup>2</sup> The very fact that Minneapolis is dependent solely upon the Peoria gateway provides the single true guarantee of neutrality with the connecting carriers who feed the pipeline of traffic into the gateway and carry it out.

To assure neutrality, the Commission imposed standard conditions upon the Pennsylvania-Santa Fe acquisition. In open hearing, Minneapolis had proposed to accept those same standard conditions. The Commission blatantly disregarded that fact and concluded, without foundation, that the standard conditions would be adequate to protect others in the event of control by the powerful Pennsylvania-Santa Fe combine, but not in the event of ownership by the infinitely weaker appellant. In the same vein the Commission brushed off as unimportant the clear, convincing and unchallenged evidence of the loss the Minneapolis would suffer from the Pennsylvania-Santa Fe acquisition (Tr. 1162-1175-83, 1237, 1258 *et seq.*, 1388, 1545, 1611 *et seq.*). In contrast it stated that acquisition by Minneapolis would be "extremely harmful to other carriers" (J. St. 73), naming only the Wabash. The extreme solicitude for that large subsidiary of the Pennsylvania was based on a confused and unsupported claim of one witness which was rendered meaningless on cross examination (Tr. 1415-16, 1448-50). In order to survive, the Minneapolis could not do otherwise than maintain a policy of neutrality with respect to all connecting carriers. The giant Pennsylvania and the giant Santa Fe are under far less economic compulsion. Their powerful ability to reward or punish is already all too well known to connecting lines.

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Mr. Gurley, President of the Santa Fe, in discussing the influence of the traffic solicitors on the routing of traffic, testified that "our utmost could really be quite tremendous" (Tr. 170).



By its adoption of the false standard of "independence" and by its distortion of the concept of "neutrality" and the disparity of the treatment of the competing applications thereunder, the Interstate Commerce Commission disobeyed the statutory mandate and made a farce of the concept of a comparative hearing.

## 2.

**On certain essential issues the Interstate Commerce Commission failed to make any findings; on others its findings are contrary to undisputed record facts.**

The report of the Commission makes no serious effort to present systematic and authentic findings to support its predetermined conclusion. The motions to affirm fail to discuss some of the important issues which the Commission ignored, and rely on the Commission's recitals of position as a substitute for findings on other vital areas of conflict. Finally, they deal with some of the evidence pertinent to a few of the findings which require full briefing on the merits. At this preliminary stage we shall indicate only briefly certain of the important deficiencies in the Commission report.

1. We have already noted the absence of any findings with respect to the economies and improved service proposed by Minneapolis or the benefits to the national transportation system of strengthening Minneapolis and diversifying its traffic through the combination with Western. Indeed, in at least thirteen instances the report cites the position of Minneapolis without drawing any conclusion. The terminology used is "Minneapolis contends", "Minneapolis estimates", "Minneapolis states", and "Minneapolis insists" (J. St. 72-78). Nowhere in its report does the



Commission evaluate the validity of these positions and their effect under the ultimate standard of the public interest, despite the fact that in no material respect was the supporting evidence contradicted in the record.

2. The Commission made no findings with respect to the economic motivation of the competing applicants. Minneapolis proved, and the President of Pennsylvania conceded, that he had long regarded Western and Minneapolis as a natural combination (Tr. 306-08, 970, 1040). When Minneapolis began negotiating in 1954 for the purchase of Western and the Monon (a small railroad running roughly north and south in Indiana) so as to promote an outer-outer belt line circumventing Chicago, Pennsylvania moved in to buy Western and stop that "nonsense" (Tr. 309, 310, 1040). That vital aspect of purpose and motive is completely omitted from any findings of the Commission. The seriousness of the omission is underscored by the fact that Pennsylvania had previously proved what disastrous consequences its ownership could have for Western (see pp. 13-14, *infra*).

3. With respect to the propriety of the purchase price, the Commission based its approval on the statement that the price to Pennsylvania-Santa Fe "was established on the basis of agreement between a willing seller and a willing buyer" (J. St. 85). The Commission made no findings with respect to these pertinent considerations:

(a) A few weeks before they entered the transaction at \$135 per share which was subsequently approved by the Commission, the same "willing buyers" entered into contracts with the same "willing sellers" to purchase 52 per cent of Western's stock at \$100 per

share (Exs. 7-f, 7-g, to I -S. F. application). Obviously the minority shares would be worth less than majority control. If the Commission had power to approve a price negotiated at "arm's length" in May, 35 per cent higher than the price negotiated at "arm's length" in April, at minimum it was incumbent upon the Commission to explore the transactions and to set out the findings of fact upon which it relied.

(b) The Commission stated that if \$135 per share were a proper price for Minneapolis to pay, it would automatically be fair and reasonable for the Pennsylvania-Santa Fe group (J. St. 86).<sup>3</sup> The Pennsylvania-Santa Fe motion to affirm attempts to make capital of the fact that in its petition for reconsideration before the full Commission, Minneapolis requested inclusion in the ownership group if Pennsylvania-Santa Fe were successful. That request, of course, was made without regard to the purchase price and as a matter of desperate defense necessity because of the ruinous effect unfettered Pennsylvania-Santa Fe ownership would have on the traffic and income of Minneapolis.

(c) The price earnings ratio, embraced in the Pennsylvania-Santa Fe proposal, far outstripped the price earnings ratios of all other railroads in the United States, as shown by the public markets. That fact passed unnoticed and its significance was not appraised.

<sup>3</sup> Based on the 1954 figures used at the hearing, the Pennsylvania-Santa Fe purchase was predicated on average annual earnings from Western of some \$641,000, whereas the Minneapolis offer to pay the same price was predicated, as a result of the proposed economies on average earnings of Western of some \$1,279,000 (Tr. 1387-88). How those two can be equated, the Commission's report does not reveal.

In the District Court both the Commission and the successful applicants attempted to shore up the Commission's fallacious conclusions as to the purchase price by decrying the "speculative test of potential earnings". In so doing, they ignored the principle that "the commercial value of property consists in the expectation of income from it". *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U. S. 217, 226 (1908). See also, *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 526 (1941); *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523, 540 (1943).

4. On the topic of the promotion and future of the Peoria gateway, the Commission omitted findings of undisputed facts and made findings directly contrary to the sworn testimony of officers of the successful applicants.

(a) No finding was made of the fact that, by the use of competing gateways, Pennsylvania and Santa Fe are in full and complete competition with the Peoria gateway. Conversely Minneapolis relies exclusively upon the Peoria gateway, which constitutes its lifeline.

(b) Neither Pennsylvania nor Santa Fe has solicited for the Peoria gateway because economic self-interests have dictated the longer haul through St. Louis and Chicago for Pennsylvania and through Chicago for the Santa Fe. The Commission found that all this would change, and that while "Pennsylvania will continue to solicit its long haul to St. Louis, Effner and Chicago will be on a parity" (Tr. 76). That runs directly counter to the sworn testimony of Mr. Symes, President of Pennsylvania, who testified that the past solicitation policy had been for St. Louis first, Chicago next, and Effner (for the Peoria gateway) last. When asked about the future, he said that the policy would not

"change very much" (Tr. 280-82, 291-92).<sup>4</sup> With respect to the Santa Fe the record is somewhat more confused, but nevertheless contradicts the bald assertion of the Commission that Lomax (at the western end of Western) and Chicago would be on a parity. Mr. Duffy, the Traffic Vice President of the Santa Fe, conceded that unrouted traffic would be sent through Chicago for the long haul (Tr. 259).

That testimony from the two successful applicants showing their preference for Chicago also contradicts the Commission's conclusion that "Santa Fe and Pennsylvania are just about as well off financially when handling traffic via Western as they would be on the long haul through Chicago" (J. St. 75). True, there was a self-serving generalization to that effect in the evidence, but if the Pennsylvania-Santa Fe partners were to sustain the notion that their economic self-interest was in the shorter, rather than in the longer, haul, they were duty-bound to produce data and figures to establish that startling fact. This Court has long recognized that the contrary is true. See *United States v. Southern Pacific Co.*, 259 U. S. 214, 231 (1922).

Furthermore, the Commission, with its asserted expertise, must have been aware, as is any thoughtful businessman, of the lower incremental costs and the higher margins of profit arising from more intensive utilization of yard facilities, which facilities the two successful applicants have in the major competing gateways. Subsequent to the Commission's determination,

<sup>4</sup> On a related point, when speaking of the Effner interchange at the east end of Western, Mr. Symes testified (Tr. 321): "That is what I mean when I say we made it, if anything here does harm to it, we could destroy it. That is not a threat, I don't mean it that way but I could very well do it from the standpoint of economics."

Santa Fe announced the opening of a "high-speed 'push-button' railroad freight yard" in Chicago which would double the existing working capacity of the Santa Fe yard (Santa Fe Railway press release, March 25, 1958). That announced investment of 20 million dollars in improvements to double the working capacity in Chicago effectively belies the notion of preference or equality for the short haul through Peoria.

(c) The Commission expressed confidence that the Pennsylvania-Santa Fe acquisition would improve Western's car supply, despite the undisputed evidence that both lines experienced great car shortages in their own operations and that Minneapolis, as the Commission conceded (J. St. 68), was one of the "bright spots" in the country in car ownership and supply.

5. The Commission ignored the lesson of history that Pennsylvania Railroad, jointly with the Burlington (a Western carrier operating from Chicago to the west); had previously owned Western and permitted it to sink into receivership. *Acquisition by T. P. & W. R. R.*, 124 I. C. C. 481 (1927). The destruction of Western was the natural result of Pennsylvania's self-interest in the competing Chicago and St. Louis gateways, which provided the longer haul. At that earlier stage, Pennsylvania and the Burlington had more than ample time and opportunity to develop Western and to build up the Peoria gateway, but as Western itself advised the Commission, "it was against the interest of the controlling companies (Pennsylvania-Burlington) to develop the property because it competed for traffic with their lines" (Ex. 100, p. 7). In the instant case no showing was made and no findings were supplied by the Commission to suggest that there has been any change

in the economic or transportation conditions which would alter Pennsylvania's economic incentives. The Commission did not have to speculate as to what Pennsylvania might do in the future; it had only to look at what it had done in the past. The economic self-interest of Minneapolis is to promote the maximum use of the Peoria gateway upon which it is solely dependent. The economic self-interest of the Pennsylvania-Santa Fe group is to use the competing long haul gateways of Chicago and St. Louis which furnish higher revenues. All of the promises that Pennsylvania and Santa Fe made to each other (and expressly "not for the benefit of others not parties hereto") cannot erase these facts; the failure of the Commission to make appropriate findings in this regard is, we respectfully submit, fatal.

6. The findings of the Commission with respect to the shippers and local officials brought to the witness stand by Pennsylvania-Santa Fe omit any consideration of the following undisputed facts:

(a) The witnesses were assembled as part of a large scale publicity campaign (Exs. H-92, H-94, H-95, H-96, H-97). Cross examination revealed that the witnesses had not seen, and, with one or two exceptions, were not even remotely aware of, the considerations underlying the Minneapolis application.

(b) All of the shippers testified that their interest was solely in good service. Not one expressed opposition to the elimination of duplicate facilities, the acceleration of train service, and the addition of more trains. Every shipper who had ever used Minneapolis testified to the excellence of its service and its satisfaction with the way Minneapolis operated (e. g., Tr. 426-28, 447-

48, 599, 602-03, 667, 700, 784, 799, 813). A mine operator who appeared on the stand to support the Pennsylvania-Santa Fe application admitted that Pennsylvania had experienced shortages of coal cars and that Minneapolis had kept his competitor supplied (Tr. 506).

(c) Finally, the Commission erred in failing to recognize that its treatment of the testimony of the shipper-witnesses should have been confined to the economic substance of that testimony. Instead, the Commission concentrated on the numbers of witnesses produced by the free-spending Pennsylvania-Santa Fe promotion, as though the proceedings before it were a popularity contest.

7. The Commission's denigration of the Minneapolis program of integration, because it would result in the displacement of some employees, ignored the following considerations with respect to which no findings were made:

(a) Integration and economy are express aims of the National Transportation Policy, and those aims can seldom, if ever, be accomplished without a reduction in employment. They can, however, be accompanied by a protective cushioning program such as the program offered by Minneapolis in the present case.

(b) The only true ultimate guarantee of job security lies in economic, efficient, profitable operations such as those proposed by the appellant, with an emphasis on augmented and improved service through the Peoria gateway. Feather-bedding cannot last forever and jobs cannot be secure when based on uneconomical operations.



(c) The appellant explained fully how minimal the impact on the employees would be because of the time consumed in integration, the replacement of retired and resigned employees in lieu of displacement, the full observance of the Washington Job Protection Agreement of 1936, and other factors (Tr. 1335-36, 1579). In fact, appellant voluntarily offered to abide by the Washington Job Protection Agreement at an earlier time than counsel for railway labor organizations was able to exact a commitment to that effect from the successful applicants.

8. The Commission made no findings of fact with respect to the elements which had to be considered on the key issue of the violation of section 10 of the Clayton Act (15 U. S. C. §20). It did not identify the interlocking directors. It made no findings with respect to the preference which Pennsylvania-Santa Fe enjoyed in the negotiations as a result of the interlocking directorate. It made no finding with respect to the exclusion of Minneapolis from the negotiations, also as a result of the interlocking directorate. Finally, if it be assumed that section 5(11) of the Interstate Commerce Act (49 U. S. C. §5(11)) could be read to permit condonation of a past violation of section 10, the Commission failed to make any findings of the considerations in the public interest which could warrant such condonation.

9. The findings as to the anticompetitive consequences of the Pennsylvania-Santa Fe acquisition are wholly inadequate to sustain the grant of immunity from antitrust prosecution.

(a) The Commission did not mention either section 1 of the Sherman Act (15 U. S. C. §1) or section 7 of



the Clayton Act (15 U. S. C. §18) and hence did not examine how the Pennsylvania-Santa Fe proposal squared with those statutory interdictions.

(b) Although the Commission discussed (without making findings) some possible consequences *within the Peoria gateway*, it gave no consideration to the power of the two railroad colossi to cut off competition by *drying up the Peoria gateway in its entirety*, and their economic incentive to do so. The record is devoid of evidence that they could not and would not do so and would not profit by sending traffic through their larger gateways—precisely as Pennsylvania and the Burlington had done for years in the past.

(c) The Commission emphasized the fact that Pennsylvania and Santa Fe are the two largest connections of Western (J. St. 61) but ignored its own finding that Western's business was obtained primarily through the aggressive solicitation of its own traffic department (J. St. 60) in competition with the solicitation of Pennsylvania and Santa Fe for other gateways.

(d) The Commission ignored the fact that the successful applicants' easy assurance of the continuation in the future of Western's aggressive traffic solicitation policies was confined to a private agreement between the two partners, which agreement expressly was not for the benefit of, and will not be enforceable by, any outside party. The Commission thus rested the ultimate standard of the public interest on the shifting sands of a private assurance between the two partners completely beyond the control of the Commission, shippers or other carriers.

**The order of the Interstate Commerce Commission condones a direct violation of Section 10 of the Clayton Act.**

The two motions to affirm which attempt to deal with the argument on this point rest primarily on the grounds that (1) there were no "dealings in securities" (P.-S. F. motion 22), and (2) that section 10 of the Clayton Act was designed "to prevent a railroad from buying at too high a price" (U. S. A.-I. C. C. motion 11), whereas the Commission, in this case, expressly found the purchase price to be reasonable (P.-S. F. motion 24). Hence, it is urged that this Court make no further inquiry. With respect to the matter of "dealings in securities"—the exact language of the statutory prohibition—we have both the letter agreements of April 15, 1955 by which Wilmington Trust Company agreed to sell 26 per cent of the stock of Western to Santa Fe and 26 per cent of the stock to the Pennsylvania Company (wholly-owned subsidiary of The Pennsylvania Railroad Company) at a price of \$100 per share (Tr. 45, 1033-34; Exs. 7-f, 7-g to P.-S. F. application), and the May 26, 1955 agreement to sell stock to the Santa Fe at a price of \$135 per share (Ex. 7 to P.-S. F. application), followed shortly by the agreement to sell half of that stock to the Pennsylvania Company (Ex. 7-d to P.-S. F. application). It seems abundantly clear that the negotiations leading to those contracts, and those contracts themselves, are sufficient to come within the statutory prohibition of "dealings". At least one of the successful applicants agrees. On April 14, 1958, Pennsylvania Company commenced a lawsuit against the trustees of the McNear Estate, seeking specific performance of the April 15,

1955 contract to sell at \$100 per share, or, in the alternative, damages for breach of that contract in the amount of \$35 per share (*Pennsylvania Company, etc. v. Wilmington Trust Company, etc. & ano.*, Civil Action No. 969, Court of Chancery, New Castle County, State of Delaware). That lawsuit is presently pending.

The moving parties suggest that the prohibition of section 10 applies only to a consummated purchase of securities (e. g., P.-S. F. motion 24). Had Congress so intended, it would have been easy to use appropriate language to that effect. The adoption of the term "dealings" is intended to encompass all business transactions with respect to the enumerated subject matter.

Nor is there any basis for assuming that the adequacy of price was the sole consideration to which the Congress addressed its attention. The sole judicial decision on the subject is to the contrary. *In re Missouri Pacific R. Co.*, 13 F. Supp. 888 (E. D. Mo. 1935). If the hospitable approach of that decision to remedial legislation in the public interest is to be rejected, it should be done on a basis of nothing less than an authoritative determination by this Court.

It is true, as the moving parties suggest, that the penalties for violation of section 10 of the Clayton Act are criminal. Nevertheless, the fact remains that the Commission must determine whether a transaction, conceived in such illegality and ruthlessly dedicated to the suppression of competition, is so vital to the health of our national transportation system that the violators of the law should be clothed with immunity to assure them the fruits of their illegal conduct. Even if one assumes that the power to condone prior violations, as well as the power to immunize future violations, of the antitrust laws is to be read into section

5(11) of the Interstate Commerce Act, such power may not properly be exercised by edict or fiat, unaccompanied by findings which disclose the considerations in the public interest dictating its exercise.

Significantly enough, both the Commission and the District Court completely ignored and did not even mention the only judicial decision construing section 10 of the Clayton Act. That decision held that the statute must be enforced even where circumstances do not permit the competitive bidding established as an exemption by the statute. *In re Missouri Pacific R. Co.*, *supra*. Here, of course, Wilmington Trust Company could have allowed competitive bidding and could have afforded Pennsylvania Railroad the opportunity of purchasing the stock by that means, but such action would have denied Pennsylvania Railroad the special preference which it secured. The transparency of the attempts by the tribunals below to avoid the impact of section 10 are manifest by the Commission's suggestion that taking the second contract in the name of the Santa Fe, with a subsequent division of the shares with the partner, Pennsylvania, immunized the transaction from the

The law seems clear, of course, that the Commission's power under section 5(11) does not extend to the condonation of past violations. See Commissioner Eastman's concurring opinion in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 152 I.C.C. 721, 740 (1929), construing the earlier statutory version of what is now section 5(11).

"Plainly there is nothing in this provision which in any way modifies the antitrust statutes, and nothing which suspends their operation until we have made an order. In that event the operation of these statutes is suspended with reference only to the acts authorized or required by the order. In no way is it suspended with reference to unauthorized acts pending our subsequent approval or disapproval, such suspension to continue if we approve and to cease if we disapprove. If that had been the intent of Congress it could very easily have been expressed, but there is no language which even remotely suggests such an intent" (emphasis in original).

statute (J. St. 88), and the District Court's intimation that the statutory prohibition could be evaded by virtue of the fact that the Pennsylvania Railroad acted through its wholly-owned subsidiary, Pennsylvania Company (J. St. 46, fnat. 3).

The unpleasant odor of these intimations is not dissipated by the suggestion of the Department of Justice in its motion to affirm (p. 12) that this case presents at most "a technical breach of the provisions of Section 10". Rather, this case presents, with all the ugly brush strokes highlighted, a vivid picture of the nation's largest railroad carrier using the influence of an interlocking directorate to crush the natural expansion of a small carrier—and doing that for the deliberate purpose of stifling competition. If that be merely a technical breach, let it be technically suppressed, not technically condoned.

#### 4.

**The Pennsylvania-Santa Fe acquisition was designed and calculated to restrain competition via the Peoria gateway and to afford monopolistic power to the successful applicants; the Commission's attempt to immunize that acquisition from the operation of the antitrust laws was an abuse of its statutory power.**

In dealing with this argument, the several motions to affirm err primarily in (1) ignoring the motives of the successful applicants, and (2) considering the Peoria gateway alone without regard to the primary interests of the successful applicants in other, more lucrative, competing gateways.

Pennsylvania Railroad, the nation's largest carrier, enjoys a dominant position in the St. Louis and Chicago

gateways, and, through its subsidiary, the Wabash, in the Decatur gateway. Santa Fe has a dominant position in the Chicago gateway. Among all the carriers in the United States, they are two of the largest originators of traffic, and, as such, are able to exercise a tremendous influence over the routing of traffic. To allow control of a competing gateway—Peoria—to pass into the hands of the Pennsylvania-Santa Fe combine puts them in a powerful position to strangle competition through Peoria, to the advantage of their preferential positions in Chicago and St. Louis and Decatur. That the fear is not idle is made apparent by the testimony of Mr. Symes, President of the Pennsylvania, that "we could destroy it" (Tr. 321). No serious consideration was given to this subject and no substantive findings on it were provided by the Commission. Indeed, the Commission did not even mention section 1 of the Sherman Act or section 7 of the Clayton Act.

Many years ago this Court analyzed and condemned the very evils which the Commission and the District Court have here chosen to sanction. In *United States v. Southern Pacific Co.*, 259 U. S. 214, 230 (1922), the Court stated:

"Such combinations, not the result of normal and natural growth and development, but springing from the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected."

The foregoing principle was then applied to the very considerations which will inevitably influence the Pennsylvania-Santa Fe group in the instant case. The Court stated:

"Self-interest dictates the solicitation and procurement of freight for the longer haul by the Southern Pacific lines. While many practices, formerly in vogue, are eliminated by the legislation of Congress regulating interstate commerce, and through rates and transportation may be had under public supervision, there are elements of competition in the granting of special facilities, the prompt carrying and delivery of freight, the ready and agreeable adjustment and settlement of claims, and other elements which that legislation does not control." (259 U. S. at 231)

In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 152 I. C. C. 721, 735, 736 (1929), the Commission pointed out that (a) the effective competition in the solicitation of the acquired carrier could not survive the acquisition because, "knowledge of its relationship to its controlling lines would deprive it of force as a competitor for their traffic", and (b) the motivation of the acquiring carriers "to prevent the consummation of the plans for a competing through system" should not be ignored.

As indicated above, the Commission's report was silent on the motives of the Pennsylvania-Santa Fe group, although evidence on that point was clear, convincing and uncontradicted (Tr. 302-303, 309, 1040). Even the most ingenuous of optimists ought to be convinced by the admission made by President Symes of Pennsylvania under oath that he entered upon negotiations to acquire Western in order to block the competitive outer-outer belt line around Chicago which Minneapolis was proposing to establish by acquisition first of Western and then of the small Monon



railway (Tr. 310).<sup>6</sup> The Commission, the District Court, and the moving parties are unanimous in their disregard of the intent and history of the Pennsylvania-Santa Fe purposes and negotiations. If the suspicion of a purpose to suppress competition was sufficient to evoke disapproval in the *Baltimore & O. R. Co.* case, *supra*, how much more forceful is the demand for judicial condemnation in the instant case, where the improper motives are admitted under oath by the prime movers.

At times the Justice Department has shown an awareness of its duty in this respect quite at variance with the position adopted in its motion to affirm here. On December 30, 1958, the Assistant Attorney General in charge of the Antitrust Division wrote the Chairman of the Civil Aeronautics Board in response to a request for a comment on the certificated air carriers' mutual assistance pact. That letter dealt with the Board's obligation to weigh competitive factors under section 2 of the Civil Aeronautics Act (49 U. S. C. former §402) before granting antitrust immu-

<sup>6</sup> The President of the Santa Fe did not address himself to exactly the same question, but testified:

"Q. Mr. Gurley, is it proper to conclude from your testimony that when there are two competing applicants for control of a given railroad the applicant having the greatest exchange of traffic with that railroad should be preferred?

"A. Well, I think I'd answer that by saying that is pretty nearly yes, there might be some qualifications but I think the answer is yes. (Tr. 72)

\* \* \* \* \*

"A. You say you don't want a lengthy answer, and the brief answer is that we prefer to own it.

"Q. Don't you feel that you are protected by those conditions?

"A. Be that as it may, I prefer to own it, that is the reason I oppose them." (Tr. 180)

That was the best showing in the public interest that Santa Fe's President was able to offer.



nity—an obligation not unlike that which rested on the Interstate Commerce Commission in this case. At the outset the Department of Justice pointed out that the Board should inquire into the motives or purposes of the proposed pact and then examine its effects upon competition.

The duty of the Commission with respect to granting immunity under the antitrust laws was spelled out by Mr. Justice Rutledge, speaking for this court in *McLean Trucking Co. v. United States*, 321 U. S. 67, 86, 88 (1944):

“Congress however neither has made the antitrust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and *to make certain that the former was permitted only where appropriate to further the national transportation policy*, it placed in the Commission power to control such developments.

\* \* \* \* \*

“If the Commission did not exceed the statutory limits within which Congress confined its discretion *and its findings are adequate and supported by evidence*, it is not our function to upset its order.” (Emphasis supplied)

In discharging that obligation, the Commission may not substitute its own conclusory evaluation of competitive requirements for the dictates of the National Transportation Policy. See *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86 (1953).

In its report the Commission did concede that the effect of the Pennsylvania-Santa Fe acquisition might be “some diversion of traffic” (J. St. 76). The Commission, how-

ever, was addressing itself solely to the narrow effect as among the several carriers within the Peoria gateway. What it failed to consider was the much more important, much broader, question of the future of the Peoria gateway itself when in the hands of powerful carriers whose primary interests lay elsewhere. It ignored the fact that its order would place it within the unrestrained power of the Pennsylvania-Santa Fe group substantially to lessen the traffic through the Peoria gateway, for the benefit of the competing St. Louis and Chicago gateways, which, at least in respect of the Pennsylvania Railroad, was the very purpose of the acquisition. It also was blind to the fact that the drying up of the Peoria gateway had been the actual result of the earlier analogous ownership of Western by Pennsylvania Railroad and Burlington. It is in this vital and sensitive area of the working of economic forces that the Commission was called upon to exercise the highest level of expertise knowledge, and it is in this very area that the greatest vacuum exists in the Commission's report.

The Commission was required to consider whether the "public interest" to be served by a grant of the Pennsylvania-Santa Fe application was so clear and convincing as to warrant immunization from the effect of the antitrust laws. In discharging that function, it was incumbent upon the Commission to consider the available alternatives. The Minneapolis application was ready at hand as a clear alternative. It was calculated to promote and stimulate; rather than to stifle and lessen, competition. It carried with it, in the public interest, the economy, the integration and the elimination of duplication and waste, objectives underscored in the National Transportation Policy. The gradual reduction of unnecessary job positions contemplated under

the Minneapolis proposal was to be effected under the cushioning protection of the policy established by the Commission for just that purpose. The Commission's criticism of the Minneapolis proposal on the ground that top management would no longer be located in Peoria has been shown to be a transparent sham in which the Commission can take little pride as an expert.

The blunt truth is that the Commission simply did not consider whether the harm to the public from the monopolistic power which the acquisition of Western would concentrate in the Pennsylvania-Santa Fe group could be avoided in reasonable fashion by the alternative Minneapolis proposal. The applications were not balanced in that light. There was no weighing of the Minneapolis application with its emphasis on promoting the competition of the Peoria gateway against the proposal of the successful applicants whose interests lay elsewhere. Indeed, after the Commission decided to grant the Pennsylvania-Santa Fe application, it said quite frankly that that action made the Minneapolis application moot (J. St. 94). Perhaps that very admission accounts for the fact that the Commission chose never to dignify by findings the considerations underlying the Minneapolis application.

We respectfully suggest that the Commission utterly failed to discharge the serious weighty duty entrusted to it of determining whether or not immunity from antitrust prosecution should be granted to the Pennsylvania-Santa Fe partners.

**The District Court review was inadequate.**

None of the motions to affirm makes any real effort to defend the perfunctory opinion of the District Court. The reason is not far to seek.

The errors committed by the Commission to which this brief is addressed relate to the improper application of the law, the failure to make findings on many vital issues, and the inadequacy of the record basis for the significant findings which were made. There can be no dispute that these items constitute a proper subject matter for judicial review. The District Court failed to recognize the scope of its authority to deal with these errors. It summed up its concept of the whole matter in the extraordinary statement that, "within the limits of the jurisdiction conferred upon it, the power of a Court or an administrative agency to decide questions is not confined to deciding them correctly" (J. St. 45). And with all respect, we suggest that the District Court in its opinion applied that approach literally.

**CONCLUSION**

We recognize that we are asking this Court to make a true analysis of the facts and law and to look behind the superficial plausibility of the Commission report and the easy reliance thereon by the District Court. We do so only because there is no other way to avoid a dangerous precedent and to avert a serious miscarriage of administrative justice.

For the reasons set forth above, as well as those presented in our Jurisdictional Statement, it is respectfully submitted that the questions presented by this appeal are sub-

stantial, that they are of public importance, and that they require that the motions be denied and the appeal be heard on the merits.

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BRIEF OF ANTELLANT

THE MINA CAPELIS AND ST

LOUIS RAILWAY

COMPANY

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Office-Supreme Court, U.S.

FILED

SEP. 14 1959

JAMES R. BROWNING, Clerk

**In the  
Supreme Court of the United States  
OCTOBER TERM 1959**

**No. 12**

**THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, A  
MINNESOTA CORPORATION**

*Appellant*

**vs.**

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.**

*Appellees*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

**BRIEF OF APPELLANT  
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**In the  
Supreme Court of the United States.**

OCTOBER TERM 1959

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No. 12.

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THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, A  
MINNESOTA CORPORATION

*Appellant*

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.

*Appellees*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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**BRIEF OF APPELLANT  
THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY**

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**OPINIONS BELOW**

The opinion of the District Court for the District of Minnesota, 4th Division (R. 91-105), is reported at 165 F. Supp. 893. The report of Division 4 of the Interstate Commerce Commission (R. 17-49), is reported at 295 I.C.C. 523.

**JURISDICTION**

The action in the District Court was brought under 28 U.S.C. § 1336 to set aside orders of the Interstate Com-

merce Commission. It was heard by a District Court of three judges, as provided in 28 U.S.C. § 2284 and §§ 2321-2325. The final order of the District Court was entered September 16, 1958 (R. 105), and the Notice of Appeal was filed in that Court October 2, 1958 (R. 106-110). On March 9, 1959, this Court entered an order noting probable jurisdiction and transferring this case, together with two companion appeals (Nos. 27 and 28) to the summary calendar (R. 2029). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the determination of the District Court on direct appeal in this case: *Chicago, M., St. P. & P. RR. v. Illinois*, 355 U.S. 300 (1958); *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151 (1957); *United States v. ICC*, 352 U.S. 158 (1956); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

#### STATUTES INVOLVED

Section 1 of the Sherman Act, as amended (26 Stat. 209, as amended, 15 U.S.C. § 1); section 7 of the Clayton Act, as amended (38 Stat. 731, as amended, 15 U.S.C. § 18); section 10 of the Clayton Act (38 Stat. 734, 15 U.S.C. § 20); the National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding § 1); sections 5(2) and 5(11) of the Interstate Commerce Act, as amended (24 Stat. 380, as amended, 15 U.S.C. §§ 5(2) and 5(11)); and sections 8(b) and 10(e) of the Administrative Procedure Act (60 Stat. 242, 243, 5 U.S.C. §§ 1007(b) and 1009 (e)) are set forth in Appendix A hereto.



### QUESTIONS PRESENTED FOR REVIEW

1. Minneapolis was denied a comparative hearing.
2. Under the appropriate legislative standard, the Commission may not authorize an acquisition that violates section 1 of the Sherman Act and sections 7 and 10 of the Clayton Act, in the face of an alternative application which would promote competition and assure, as well, improved and accelerated service, added service routes, large operating economies and the strengthening of a small carrier.
3. The legislative standard of "public interest" requires an accommodation of the antitrust laws and the National Transportation Policy of the Interstate Commerce Act. The national policy of unfettered competition may be overridden only by compelling considerations of improved service, safer operation, lower costs and other aspects of sound and effective transportation, of such magnitude as to outweigh the public harm of stifled competition or monopoly.
4. The Commission's order is invalidated by the total failure to make findings of fact on many essential issues and the making of findings contrary to the undisputed record proof. No findings were made with respect to (i) public service benefits of the Minneapolis application, (ii) Penn-

1. The interested railroads will be referred to hereinafter as follows:
- |  |              |
|--|--------------|
| The Minneapolis & St. Louis Railway Company      | Minneapolis  |
| Toledo, Peoria & Western Railroad Company        | Western      |
| The Pennsylvania Railroad Company                | Pennsylvania |
| The Atchison, Topeka & Santa Fe Railroad Company | Santa Fe     |
| Chicago, Burlington & Quincy Railroad Company    | Burlington   |
| Wabash Railroad Company                          | Wabash       |
| The Monon Railroad                               | Monon        |
| New York, Chicago & St. Louis Railroad Company   | Nickel Plate |
| Chicago, Rock Island & Pacific Railroad Company  | Rock Island  |



sylvania's specific intent to stifle competition by the acquisition of Western, (iii) the contrasting motivations and self-interests of the competing applicants, (iv) antitrust questions, and other important considerations. The basic finding that Pennsylvania-Santa Fe would solicit traffic for the Peoria gateway on a parity with their long haul gateways is in direct contradiction with the testimony of their own principal officers and their economic incentives. Similar conflicts invalidate the findings as to industrial development, "independence" of Western and other matters.

5. The purchase of Western shares by Pennsylvania and the underlying negotiations and contracts constitute violations of section 10 of the Clayton Act to which the Commission cannot accord retroactive condonation.

6. The Commission may not sanction Pennsylvania's scheme to stifle competition with Chicago and St. Louis gateways by blocking the acquisition of Western by Minneapolis.

7. The District Court improperly declined to review the errors of law and the failure of the Commission to supply systematic findings, adequately supported by the record, in conformity with the Administrative Procedure Act.

#### STATEMENT OF THE CASE

This action was instituted in the District Court by Minneapolis to set aside orders of the Interstate Commerce Commission denying the Minneapolis application to acquire the capital stock of Western and authorizing the acquisition of Western's shares in equal parts by Pennsylvania and Santa Fe. The appeal is from the District

Court's order dismissing the complaint and, in effect, sustaining the report of the Commission.<sup>2</sup>

1. The Competing Gateways, the Competing Applicants and the Status of Western.

Western is a short railroad spanning Illinois east and west through Peoria; it utilizes the Peoria gateway to bridge east-west traffic, avoiding the longer haul and congestion through Chicago or St. Louis. (R. 21) For thirty-three years Pennsylvania had owned Western in partnership with the Burlington and such ownership resulted in a disastrous receivership. *Acquisition by T.P. & W.R.R.*, 124 I.C.C. 181 (1927). At the receivership sale Western was acquired by George McNear, who built it into a fine property. Upon his death the present management took over with equal success. Emancipated from Pennsylvania-Burlington control, Western engaged in aggressive solicitation for the Peoria gateway, augmenting the solicitation of complementary carriers such as Minneapolis. (R. 21, 426, 520-521, 582, 589, 590, 1011, 1408)

There are three principal gateways for rail traffic moving between the east and the west. The two largest are St. Louis and Chicago. Lying about midway between St. Louis and Chicago, Peoria provides a third competitive gateway, bypassing the larger terminals with heavier traffic and affording an opportunity for expedited service. (R. 21) Western (and complementary carriers such as Minneapolis) have aggressively solicited Peoria gateway routing. Much of this volume is bridge traffic, received or delivered

<sup>2</sup>For the convenience of the Court, we have included at the end of the brief two maps showing the routes of the railroads primarily involved in the appeal. Map I covers the entire United States. Map II shows in greater detail the north central section of the country and the gateways and other points to which frequent reference is made.

at Effner on the east and Nemo and Lomax on the west. Thus, Pennsylvania and Santa Fe have become Western's largest connections without the solicitation of a pound of Peoria gateway freight. Pennsylvania and Santa Fe have solicited exclusively for the longer hauls and better divisions through the Chicago and St. Louis gateways. (R. 21, 402, 426, 520-522, 582, 589, 590, 1011, 1408)

Minneapolis is a small agricultural carrier with its main line operating between Minneapolis, Minnesota, and Peoria, Illinois. Branch lines extend into South Dakota and through Minnesota and Iowa. The Commission found that Minneapolis was sixtieth in size among the 127 Class I railroads and had annual operating revenues approximating \$20,000,000. The Commission found further that the capital structure of Minneapolis is conservative, unburdened by preferred stock, and carries only a relatively small amount of long term debt. It came out of reorganization receivership in 1943 and, according to the Commission, was built into a modern and efficient plant providing exceptionally good service to the public. It is completely dieselized and owns what the Commission described as well-conditioned rolling stock, adequate to accommodate an increase of 25% in the tonnage now available to it. Minneapolis is predominantly an east-west railroad, with the operating slogan "The Peoria Gateway", used since 1912. It advertises, promotes and utilizes the Peoria gateway, which is the only east-west gateway to which it has access. (R. 27-28, 1011)

The successful applicants are two of the largest, most powerful rail carriers in the United States. They converge at Chicago. Santa Fe extends from that point to the Pacific coast, serving 12 states. It ranks first in mileage and third in freight revenues among all carriers. About 64%

of its freight revenues are derived from the transportation of manufactured products originating on its lines. Santa Fe enters the Kansas City and Chicago gateways and connects with Western at Lomax, Illinois for traffic through Peoria. (R. 25-26) Some years ago the Commission denied the Santa Fe entrance into the St. Louis gateway. *Chicago, B. & Q. R. R. Control*, 271 I.C.C. 63 (1948). In Chicago, Santa Fe has recently completed a \$20 million push-button freight yard, doubling the number of cars that can be handled, enlarging the storage facilities, and greatly accelerating interchange. The President of Santa Fe conceded that its Chicago line competes with the full length of Western. (R. 388, 398)

The Commission found Pennsylvania to be the largest rail carrier "by practically any standard used to indicate size and volume of business handled." (R. 26) Its system operates in thirteen states and blankets the industrial east. Wabash, an almost entirely owned subsidiary, has lines extending westwardly to Des Moines, Iowa, Omaha, Nebraska, and Kansas City. (R. 26) More than half of Pennsylvania's freight revenue is derived from manufactured goods originating on its lines. (R. 26) Pennsylvania solicits traffic for its long haul through St. Louis and then Chicago, both lines being competitive with Western. (R. 521-522) The Decatur gateway, served by its subsidiary Wabash, provides another competitive route (see attached maps).

## 2. Motivations of the Competing Applicants.

Shortly after World War II there were discussions that Minneapolis might acquire Western. From that time until

Santa Fe press release, March 25, 1958; Chicago Tribune, March 26, 1958, p. 5; Traffic World, March 29, 1958, p. 152; Railway Age, March 31, 1958, pp. 18-9.

as late as 1954, the President of Pennsylvania urged the heads of Minneapolis and Western to merge their properties and operations. (R. 537-538, 977-978) In June, 1954 new management took control of the Minneapolis and immediately opened negotiations with the McNear trustees for the purchase of the stock of Western. (R. 1014) The purposes, as shown by undisputed evidence, were these: (R. 1027-1028, 1076-1077, 1102-1104, 1177-1184, 1186-1187, 1222-1233, 1239-1242; Ex. H - 44, R. 1894-1924, 1379)

- (i) Economies of operation estimated at \$1,770,945 through the elimination of duplicate yard, round-house, repair, accounting and other facilities and the integration of operations.
- (ii) More intensified use of the Peoria gateway by (A) integrated through service, (B) acceleration of schedules by direct interchanges with eight railroads and the elimination of duplicate switching and transfer, (C) aggressive industrial development, and (D) an added bypass of the Chicago terminal, adding connections and services to the east, south and southwest not theretofore available for Peoria gateway routing.
- (iii) Strengthening of Minneapolis through industrial diversification and improved density of traffic, thereby solving the primary problems which had plagued Minneapolis for several decades and had resulted in its receivership and drastic reorganization.

<sup>4</sup> The condition of Minneapolis had been so precarious that in 1938 the Interstate Commerce Commission gave serious and lengthy consideration to a proposal of eight midwestern railroads to dismember and divide up Minneapolis, and in the process to abandon more than one-

The motivations of the successful applicants revealed themselves during the course of the negotiations. During the summer of 1954 the McNear trustees showed no interest in Minneapolis' offers to purchase the shares held in the trust estate and the minority interests. Despite the reluctance of the trustees even to discuss a sale, offers to purchase were repeatedly pressed upon them by Minneapolis. (R. 1014-1016) In the forepart of 1955, Wilmington Trust Company, the corporate trustee, advised Minneapolis that it would consider its latest proposal and make a response by the first of February. (R. 1017) In the meantime, Wilmington Trust Company approached the President of Pennsylvania with respect to the possible purchase of Western by his railroad. Pennsylvania exhibited immediate interest. Mr. Symes, its President, explaining on the witness stand that his change in attitude grew out of rumors that Minneapolis, Western and Monon would form an outer-outer belt line around Chicago. (R. 529, 539) Upon learning of these "grandiose plans", as Mr. Symes described them, he decided that Pennsylvania "had better take steps to stop this nonsense". (R. 1022)

While pursuing the conversations with Pennsylvania, an officer of Wilmington Trust Company and an officer of the Hanover Bank, which held a minority of the Western shares, met with the Chairman of Minneapolis and again put him off for thirty days. (R. 1017-1018) The trustees

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fourth of its trackage. Not a single bid had been received at any of the 55 occasions on which the road was offered on the auction block. The determined opposition of the States of Minnesota, South Dakota, Iowa and Illinois and their regulatory agencies accounted in large measure for the survival of the carrier, which languished in receivership for 20 years—a record in railroad history. *Associated Railways Company, Acquisition and Securities*, 228 I. C. C. 277 (1938). Donovan, *Mileposts on the Prairie* (Simmons-Boardman, 1950). This is a significant backdrop to the efforts of Minneapolis to increase the diversity and density of its traffic.

and the Hanover Bank meanwhile turned to the Pennsylvania and the Santa Fe, which had been invited into the matter by Pennsylvania. (R. 512) On April 15, 1955, Wilmington Trust Company, acting on behalf of both trustees, entered into letter agreements to sell 26% of the Western Stock to Santa Fe and a like percentage to Pennsylvania Company, a wholly-owned subsidiary of Pennsylvania, at a price of \$100 per share. (R. 365, 1018; Exs. 7-8 and 7-g to Pennsylvania-Santa Fe application, R. 174-176) Despite its earlier offers, Minneapolis received no prior notice of the proposed sale and was afforded no opportunity to negotiate or to bid a higher price. (R. 1018)

Immediately upon receiving word of the sale, the Chairman of Minneapolis advised Wilmington Trust Company of the willingness of his railroad to increase the purchase price by 5%, pursue further negotiations and enter into competitive bidding, either publicly or privately. The corporate trustee showed no interest, and when the Minneapolis Chairman offered to come to Wilmington to discuss the matter, he was advised that "it would not be worth his carfare". (R. 1018-1020) Subsequently the individual trustee of the McNear Estate indicated that he had not been informed of the Minneapolis offer, whereupon Minneapolis submitted a written offer to purchase the stock in Western owned by the McNear Estate and all minority interests at \$133 per share. (R. 1021-1022, 1024) That offer was to remain open for one week.<sup>5</sup> On the afternoon of the last day of the term of the offer, while attorneys for the individual trustee were preparing papers for the accept-

<sup>5</sup> The offer was kept open for two additional weeks upon assurance by counsel for the individual trustee that Minneapolis, having made the market for the Western shares, would be afforded an opportunity of meeting any higher bid—an assurance that was dishonored. (R. 1025-1026)



ance of the Minneapolis offer, the corporate trustee contracted for the sale to Pennsylvania and Santa Fe of all of the stock of Western held by the McNear trustees, without further conversations with Minneapolis." (R. 1026-1027; Ex. H-76, R. 1956-1957, 1445) The transaction took the form of a sale of the stock to Santa Fe in an agreement dated May 26, 1955, followed on June 28, 1955 by an agreement between Santa Fe, Pennsylvania and its subsidiary, Pennsylvania Company, under which the latter acquired half of the Western stock. (Exs. 7 and 7-d to Pennsylvania-Santa Fe application, R. 150-153, 165-169) This roundabout procedure resulted from Pennsylvania's insistence that the earlier agreement of April 15th remain in force, but the President of Santa Fe testified that from the outset he had contemplated joint ownership with Pennsylvania. (R. 409, 458)

During the period of the negotiations and contracts, the following persons were directors of Wilmington Trust Company and were also directors of Pennsylvania or its affiliates, or subsidiaries: (Ex. H-73, R. 1944-1945, 1365)

Lamot duPont Copeland was a director of Wilmington Trust Company, a director of Pennsylvania and a director of a Pennsylvania subsidiary.

At the outset, Pennsylvania told Wilmington Trust that it would not discuss acquisition of Western "if they had in mind negotiating with us and others for the purpose of raising the price of the stock". (R. 512) The trustee with the interlocking directors yielded quickly. At every stage of the negotiations, Pennsylvania was afforded a decisive preference by Wilmington Trust Company. As the Minneapolis offer was expiring, Wilmington Trust approached Symes and Gurley to "match the price", which they promptly did by topping the Minneapolis offer of \$12 million for all the Western stock by \$150,000. Wilmington Trust did not even bother to telephone Minneapolis, which had made the high level market for Western's shares. (R. 535, 367, 391, 1026-1027)



F. M. Donohue was a Vice President and director of Wilmington Trust Company and a director of two Pennsylvania subsidiaries.

Hugh M. Morris was a director of Wilmington Trust Company and a director of a Pennsylvania subsidiary.

~~Wilmer~~ Stradley was a director of Wilmington Trust Company and a director of a Pennsylvania subsidiary.

The Commission omitted from its report any findings with respect to the interlocking directors, the special preference accorded Pennsylvania-Santa Fe in the negotiations, or the motivations and objectives of the competing applicants in the acquisition of Western.

### 3. Proceedings before the Interstate Commerce Commission.

Pennsylvania and Santa Fe filed an application for approval of joint acquisition of control of Western through exercise of the several stock purchase contracts. (R. 129-130) Minneapolis filed an application with the Commission for authority to acquire Western. Minneapolis did not have a contract but proposed that if its application were approved, it would purchase for cash all of the outstanding stock of Western at the same price and upon the same terms proposed by Pennsylvania-Santa Fe. (R. 281) The applications were consolidated for hearing. (R. 2027-2028)

Numerous parties intervened in the two dockets. Nickel Plate and Rock Island each requested authority to be included in the acquisition of the Western stock on an equal basis with the successful applicant or applicants. Burlington and Wabash expressed no objection to the Pennsylvania-Santa Fe application, provided appropriate condi-

tions were attached for continuance of existing routes and traffic arrangements. They asked, however, that if any other carrier were authorized to acquire Western's stock, each of them be included in the transaction to the same extent as any such other railroad. Certain other carriers, without participation, requested the inclusion of certain conditions in the order authorizing control. (R. 19-20) The State of Illinois and certain other bodies intervened in support of the Pennsylvania-Santa Fe application. (R. 20) The States of Minnesota and South Dakota, together with their respective regulatory agencies, supported the application of Minneapolis upon the ground that the acquisition of Western would strengthen Minneapolis' ability to provide essential service in large agricultural areas which lacked dense and diversified traffic. (R. 328-332)

A consolidated hearing was held before an examiner who recommended (a) dismissal of the Minneapolis application, (b) approval of the Pennsylvania-Santa Fe application, and (c) denial of petitions of intervening railroads to participate in the acquisition. Exceptions, briefs and oral argument were presented before Division 4 of the Commission, which issued an order in effect sustaining the examiner. (R. 50-51) A petition for reconsideration by the full Commission was denied without opportunity for oral argument. (R. 51-53)

#### 4. Proceedings in the District Court.

On November 29, 1957 Minneapolis instituted its action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of Minnesota seeking to suspend and annul the orders of the Interstate Commerce Commission. Pending briefs and argument, a temporary restraining order was

issued. On September 6, 1958 the Court filed its order dismissing the complaint of Minneapolis. The District Court's opinion gave no consideration either to the omission of pertinent findings or to the entry of findings contrary to the sworn testimony of the successful applicants. The District Court saw no public concern with the competition-stifling motivations of the successful applicants because the "Commission had no authority to direct the trustees to deal with Minneapolis rather than with the other interested purchasers." (R. 97) The bidding requirements of section 10 of the Clayton Act were held inapplicable because the interlocking directors had not been corruptly enriched. It was further held that the Commission did not, and had no obligation to, determine "whether the acquisition of Western by these two railroads will violate the antitrust laws". (R. 101) Underlying the District Court's entire review was the comment "that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly". (R. 97)

Subsequently Minneapolis filed its Notice of Appeal (R. 106-110) and secured an injunction pending appeal. Two later Notices of Appeal were filed, one by the State of Minnesota and the Minnesota Railroad and Warehouse Commission on November 12, 1958 and the other by the State of South Dakota and its Public Utilities Commission on November 13, 1958. (R. 111-117) These parties have been intervenors throughout the entire administrative and judicial proceedings, representing the public interest of their respective jurisdictions and supporting the position of Minneapolis.

## SUMMARY OF ARGUMENT

1. The statutory standard of public interest, as amplified by the National Transportation Policy, was completely ignored. The Commission adopted "separate and independent" management of Western as the standard for determining which application to approve. The acquisition of absolute control of Western by the successful applicants robs this concept of any real meaning. The Commission fallaciously treated "separate" as synonymous with "independent." What is more serious, the illusory standard has no basis in the National Transportation Policy; it collides with the statutory policy of promoting economy and improved service and preventing unfair competition in transportation. The artificial standard served only to screen the Commission's failure to balance the relative advantages and disadvantages of the competing applications, as required in a truly comparative hearing.

Any notion that Minneapolis could discriminate in service among carriers connecting with Western runs afoul of the admissions by the successful applicants that neutrality is a product of economic self-interest. If that self-policing consideration is effective to restrain the largest carriers, it certainly cannot be flouted by a very small railroad. The standard conditions of neutrality imposed on the successful applicants in the Commission's order would provide at least equally effective protection if imposed on Minneapolis, which needs the cooperation and support of all roads serving its lifeline, the Peoria gateway.

2. The omission of pertinent findings and the entry of findings contrary to undisputed evidence deprived the Commission's report of the necessary factual expertise foundation. While the Commission noted the evidence or posi-

tion of Minneapolis with respect to economies, improved service and benefits to the national transportation system, there was a total absence of findings on these matters. Other subjects ignored in the report were the economic self-interests of the competing applicants, Pennsylvania's competition-stifling purpose in acquiring Western, the interlocking directorate, the prior disastrous history of ownership of Western by Pennsylvania and Burlington, and the absence of any reason to assume the present proposal would be less hazardous. The Commission report is barren alike of findings with respect to the violation of the antitrust laws and of any public interest consideration moving the Commission to override the antitrust violations.

Findings designed to show that Pennsylvania and Santa Fe would promote Western traffic were made in the face of contrary testimony by officers of the two railroads. The self-interest of Pennsylvania and Santa Fe is in the longer hauls through St. Louis and Chicago. No findings explain how the approved sale price of \$135 per share could be fair when only one month earlier the same sellers and the same buyers signed contracts of sale at \$100 per share. Only the exclusion of Minneapolis in order to forestall outer-outer belt line competition can account for that difference.

3. Inasmuch as Pennsylvania and Wilmington Trust Company had directors in common, the negotiations and contracts for the purchase of Western's shares by Pennsylvania constituted dealings in securities prohibited by section 10 of the Clayton Act. Pennsylvania is not insulated from that section by the fact that the second contract was taken in the name of its partner, Santa Fe, and immediately assigned to the extent of 50%, nor by the fact that Pennsylvania acted through its wholly-owned subsidiary. More-

over, nothing in the Interstate Commerce Act excuses, or authorized the Commission to condone, a past violation of the antitrust laws, even under circumstances warranting exoneration. Section 5(11) of the Act suspends the operation of the antitrust laws only with respect to future acts necessary to consummate transactions approved by the Commission.

4. The acquisition of Western by Pennsylvania-Santa Fe would tend substantially to lessen competition between the Peoria gateway and the larger, more profitable St. Louis and Chicago gateways, as well as to lessen competition within the service areas of the respective acquiring carriers. Minneapolis would be denied the opportunity of promoting the Peoria gateway and intensifying competition, with improved, accelerated service and new service routes. In these vital respects, and in linking the most powerful carrier in the east with the most powerful carrier in the west, the approved acquisition clearly offends section 1 of the Sherman Act and section 7 of the Clayton Act. Neither section was examined by the Commission, nor does the Commission's report outline any considerations of public interest so compelling and far-reaching that the consequences of the antitrust violations should be subordinated to them.

## ARGUMENT

## I.

**The standard of "separate and independent management" adopted by the Commission to determine public interest is false, artificial and meaningless and collides with the National Transportation Policy. That standard deprived Minneapolis of a fair hearing and comparative consideration of its application.**

Section 5(2)(b) of the Interstate Commerce Act lays down the ultimate standard that an acquisition transaction shall be approved if the Commission finds that it "will be consistent with the public interest". 49 U. S. C. § 5(2)(b).<sup>7</sup> That ultimate standard is given meaning by the National Transportation Policy which provides:

*"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a na-*

<sup>7</sup> In addition to that ultimate standard, section 5(2)(c) requires that consideration be given to the effects of the proposed transaction upon "adequate transportation service to the public," the effect on the public interest of including or excluding other railroads in the transaction, the fixed charge, resulting, and the interest of carrier employees affected. 49 U. S. C. § 5(2)(c).



tional transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (49 U. S. C. preceding § 1) (Emphasis supplied)

At the outset, the Commission adopted "separate and independent management" as the guiding criterion against which the competing applications would be tested. (R. 25, 46) This standard is not to be found anywhere in the Interstate Commerce Act or in any published authority. It was lifted out of the contract between Pennsylvania and Santa Fe which, incidentally, provides that it is solely for the benefit of the contracting parties and not enforceable by anyone else. (R. 24, 167) The very source of that language and the automatic exclusion of Minneapolis with its proposed elimination of duplicate facilities and unification of service, precluded any semblance of a true comparative hearing.

Independent management of a wholly-owned subsidiary is inherently meaningless. Unrestricted ownership and exclusive voting power are incompatible with independence. *Alleghany Corp. v. Breswick & Co.*, 353 U. S. 151 (1957). Secondly, the standard is not only artificial and illusory, but it disregards the basic statutory goal established by the Congress in the National Transportation Policy. The Commission was commanded to direct its activities toward achieving a strong effective transportation system designed to assure economy of operation, effective and efficient service and an avoidance of "undue preferences" and "unfair or destructive competitive practices". The Congression-



al concern for elimination of wasteful duplicate facilities, improved service, strengthening of a weak carrier and prevention of destructive competitive practices are not in any respect reflected in the Commission's criterion.

*Separate is not independent.* It is arrant nonsense to assume that the management of Western could be independent with all of the stock concentrated in, and voted, without Commission limitation, by, the powerful Pennsylvania-Santa Fe combination. While Pennsylvania-Santa Fe ownership might leave a nominal "President" in Peoria, as against a "Division Superintendent", under Minneapolis ownership, both executives would, of necessity, be subordinate to the owners in every meaningful sense. That incontrovertible fact cuts the ground from under the entire premise upon which the Commission reached its decision.

The virtue of maintaining Western's separate solicitation organization, stressed by the Commission, is not without its defeating fallacies. That organization would be placed under the control of a competing management that has consistently solicited against Peoria gateway routing. On the other hand, Minneapolis would strengthen the Western solicitation with its own organization which has always promoted the Peoria gateway. Here again the unity would involve strength, the separateness no independence. Reflecting the lack of substance in the Commission's concept of independence is the admission by the Traffic Vice President of Pennsylvania that Minneapolis could be expected "to maintain aggressive sales and service policies that have been successful in the past with respect to the Peoria gateway". (R. 590) The Minneapolis application would thus admittedly achieve the continuation of "the present policies of Western" which the Commission cites as its public interest goal. (R. 45) It would be fortified by the power-

ful incentive of self-interest and a program for the further development of the gateway through better public service, industrial development and enhanced solicitation. (R. 1102-1104, 1184, 1229-1234)

The Commission's standard presents a particularly idle illusion when it is recalled that Pennsylvania, Pennsylvania's subsidiary, Wabash, and Santa Fe are in full, active competition with Western. (R. 388, 389, 1288-1289) A more realistic approach is to be found in *ICC v. Baltimore & O. R. R.*, 152 I. C. C. 721, 735-736 (1929), where three carriers proposed acquisition of Wheeling with the retention of the Wheeling management. Rejecting the application, the Commission said:

"We are unable to accept the theory that competition of the Wheeling with the respondents might continue unimpaired pending the final assignment of the Wheeling in a consolidation of eastern lines. The knowledge of its relationship to its controlling lines would deprive it of force as a competitor for their traffic."

Control is a matter of business reality which cannot be ignored either on the basis of finespun theories or pious promises among partners. *United States v. Southern Pacific Co.*, 259 U. S. 214 (1922); *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146 (1939). The power to select rather than the domination of individual directors constitutes the realistic test of control. *Alleghany Corp. v. Breswick & Co.*, 353 U. S. 151, 162-163 (1957). Nor can the reality of control be circumvented by conditions imposed in a Commission order. *Chicago, B. & Q. R. R. Control*, 271 I. C. C. 63, 162-163 (1948). These facts were recognized in *Control of Central California Traction Co.*, 131 I. C. C. 125, 135, 136 (1927), where the Commission stated:

"It appears that irrespective of the method of operation shippers are inclined to look upon the line of a controlled company as the road of the company which exercises the control.

\* \* \* \* \*

"It is manifestly impossible to estimate with any degree of certainty the extent to which safeguards required by us would reach and counteract the influence exerted upon the practices of shippers by considerations of expediency, real or imagined, incident to obtaining adequate service."

A clue to the proposed independence of Western in operation is provided by the conversations between Santa Fe and Pennsylvania with respect to traffic routing. The only item discussed, according to Gurley, was the use of Western for routing empty refrigerator cars westward. (R. 412, 429-430) Santa Fe and Pennsylvania would thus receive the full revenue for moving the loaded refrigerator cars eastward and Western would bear the expense of moving the empties westward, without compensation and indeed with the added burden of a per mile rental. At that price the public interest in the Peoria gateway can do without the successful applicants' brand of "independence."

The adoption, at the inception, of the artificial standard necessarily ruled out a comparative hearing. The one-sided procedure was no different from that condemned by this Court in *Schaffer Transportation Co. v. United States*, 355 U. S. 83 (1957). There the Commission denied an application for a trucking service solely upon the determination that the rail service was adequate. This Court held that the Commission was not relieved of the duty of evaluating competing truck services in the light of statutory standards or from the duty of articulating, in findings, the steps it had taken to reach a composite measure of the competing positions.

What the Commission should have done in this case was to observe the requirements of the National Transportation Policy and the definition given by Chief Justice Hughes to the term "public interest" in *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25 (1932). It should have balanced the competing applications and catalogued their merits and demerits from the public viewpoint.<sup>5</sup> Had the Commission performed its function, it would have made comparative findings with respect to such matters as (1) efficiency and economies of operations,<sup>6</sup> (2) improvement and expansion of service through the Peoria gateway, (3) promotion of industrial development, (4) strengthening the carriers concerned in the interest of the national transportation system, (5) stability of employment, and (6) promotion of unfettered competition, particularly between the east-west gateways.

The competing applications present strong contrasts in each of these areas. The acquisition by Minneapolis would advance the National Transportation Policy in each of these areas under its affirmative program and under the sanction of economic self-interest. On the other hand, as a matter of announced purposes and economic self-interest, the Pennsylvania-Santa Fe acquisition would bring no improvement or expansion in operating service, no elimination of duplicate facilities or waste, no dynamic support for

<sup>5</sup> The comparative hearing technique of listing advantages and disadvantages and arriving at a "composite consideration of the findings as to the several differences, pro and con," is well described in *Johnston Broadcasting Co. v. FCC*, 175 F. 2d 351, 357 (D. C. Cir. 1949).

<sup>6</sup> "Use of the words 'economical' and 'economic' in the National Transportation Policy clearly demonstrates the intention of Congress that one of the primary concerns of Congress is to have the Commission give serious attention to the matter of providing economical transportation." *Southern Railway Co. v. United States*, 167 F. Supp. 747, 754 (M. D. Ga. 1958).

the gateway as a basis for job security, only secondary concern for new industry, and, finally, it would materially impair the fair, constructive competition that the national public policy would protect. Such rational balancing procedure the Commission spurned. It selected in advance an illusory standard unrelated to any authoritative aspect of public interest and calculated from the outset to assure the award to the successful applicants.

A so-called comparative hearing within the framework of that advance discriminatory determination was merely an empty phrase, as the Commission recognized when it said, "With our approval of that [Pennsylvania-Santa Fe] application, the possibility of the Minneapolis' acquiring the Western's stock is eliminated and its application becomes moot" (R. 48). And that, apparently, is the tacit explanation for the refusal of the Commission to make any findings with respect to the undisputed evidence that the Minneapolis application would promote the National Transportation Policy in all the respects indicated above, without offending the antitrust laws.

The economies offered by the two competing applications provided an ideal subject for comparative findings. After months of thought, preparation and consultation with Western's officers, the President of Santa Fe came up with nothing more than the likelihood that they might trade "ideas" (R. 434). Minneapolis supplied a detailed study of economies to be achieved in the amount of \$1,770,945, facility by facility, job by job.<sup>10</sup>

<sup>10</sup> The Minneapolis study showed savings to be effected by an integration of executive, accounting and operating departments, the elimination of duplicate yard, shop, roundhouse, accounting and traffic facilities, the more effective utilization of power, rolling stock and work equipment, the combination of car service, purchases and related supplementary activity. (R. 1028, 1077, 1186, 1222-1229, 1239-1242; Ex. H-44, R. 1894-1924, 1380)

At every opportunity the Commission has by decision, by report to the Congress, by testimony before Congressional Committees, by public statements, emphasized the achievement of economies through merger as one of the fundamental hopes upon which the effective survival of the railroad industry rests. 72d Annual Report of I. C. C., 4-5 (1958); testimony by Commissioners Freas and Arpaia, *Hearings Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess., pt. 2 at 1834-1836, 1845-1846, 1869-1873 (1958); *Spokane International R. R., Control*, 295 I. C. C. 425 (1956); *Seaboard Airline, Acquisition of Greenville, Midland Ry.*, — I. C. C. — (Fin. Docket 20296, March 26, 1959); *Acquisition by Denver & Rio Grande Western and Union Pacific R. R. of Properties of Bamberger R. R.*, — I. C. C. — (Fin. Docket 20338, Nov. 25, 1958); Addresses by Commissioner Freas before New York Society of Security Analysts, May 29, 1959; Commissioner Walrath before Trans-Missouri-Kansas Shippers Board, March 20, 1959; Commissioner Walrath before Southwestern Association of R. & U. Comms., April 16, 1959; Commissioner Tuggle before Great Lakes R. & U. Comms., June 30, 1958; Commissioner Tuggle before Transportation Association of America, October 9, 1958; Commissioner Murphy before Transportation Conference, University of Alabama, February 11, 1959.

Testifying before the Transportation Subcommittee of the House Armed Services committee on July 17, 1959, Chairman Tuggle of the Commission urged the transportation industry to "improve its economic health" by eliminating duplicative facilities and fostering consolidations. *Traffic World*, July 25, 1959, pp. 23-24. A year earlier, in reporting on the Transportation Act of 1958, the Surface

Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce said:

"The railroad industry has not, in the subcommittee's opinion, been sufficiently interested in self help in such matters as consolidations and mergers of railroads; joint use of facilities in order to eliminate waste such as multiple terminals and yards that require expensive interchange operations; . . ." (S. Rep. No. 1647, 85th Cong., 2d Sess. 11 (1958))

Senator Smathers, Chairman of that Subcommittee, has recently urged consolidations as the path to "better service to the public", "greater security in jobs provided by the railroads", and a "stronger transportation network for the nation's defense". Smathers, *Blueprint to Save Our Railroads*, This Week Magazine, July 26, 1959.

That the expanded, accelerated service through the Peoria gateway proposed by Minneapolis would promote the public interest in terms of both commerce and national defense needs no documentation. The definite realistic Minneapolis proposals contemplate (1) the establishment of through trains, (2) the acceleration of time schedules by direct interchanges with other railroads, and (3) the establishment of a new interchange with the Chicago and Eastern Illinois Railroad at Watseka, Illinois, to open a new bypass of the Chicago terminal" (R. 1177-1184). Pennsylvania and Santa Fe could hardly be expect-

<sup>11</sup>The new bypass would open new, broader and faster routings through the Peoria gateway to the east, the south and the southwest via many carriers. In a number of instances it would substitute mainline, for branch line, connections. In considerable measure it would provide the outer-outer belt line, competition from which Pennsylvania sought to forestall by the purchase of Western. That fact is apparent from examination of attached Map H and by comparison of maps 15 and 17 in Exhibit H-4 (R. 1629, 1631, 462). In addition, direct interchanges will cut terminal delays as much as 24 to 48 hours and even the first class freight trains will make faster deliveries. (R. 1179, 1230)



ed to intensify competition with the gateways they dominate by improving the service through Peoria, and no such improvement was suggested. Here is an obvious, measurable contrast which the Commission elected not to draw.

Nor can a truly comparative analysis omit findings on the critical issue of the motivations and economic self-interests of the competing applicants. The undisputed evidence reveals, and Pennsylvania's President admitted under oath, that Pennsylvania entered upon the acquisition of Western for the deliberate purpose of blocking the purchase by Minneapolis so as to foreclose competition from an outer-outer belt line around Chicago (R. 535, 539, 1022). Here is a specific intent to monopolize and to restrain competition, to which neither the Commission nor the District Court paid the slightest attention. The Commission's shocking disinterest in the elimination of waste and duplication, in the added and accelerated service to the public proposed by Minneapolis and, above all, in the competition-stifling purpose of the nation's most powerful carrier resulted in a discriminatory and unfair hearing and a total failure to meet the requirements of the Administrative Procedure Act, 5 U. S. C. § 1007 (b). The failure to disclose the factors balanced for the ultimate conclusion necessarily precluded proper judicial review. *Schaffer Transportation Co. v. United States*, 355 U. S. 83 (1957).

The public interest is served by affording a carrier the opportunity to expand and develop its facilities and to make itself sufficiently strong, financially and otherwise, to provide effective and adequate competitive . . . service." *American Bus Lines, Inc., Purchase, Dollar Lines*, 56 M. C.C. 39, 48 (1949). Public interest has been held to warrant an acquisition for the purpose of strengthening a weak carrier. *Savannah & A. Ry. Co., Control*, 282 I.C.C. 39,



60 (1951). Western is a natural extension of Minneapolis, which would derive significant strength from the acquisition in terms of diversity and density of traffic as well as financial stability and revenues. The freight business of Western would add a third to that of Minneapolis and increase the net railway operating income 36.9%. (R. 1402) The thin traffic lines, so important to the States of Minnesota and South Dakota would be balanced and fortified. On the other hand, the effect of the acquisition of Western could hardly be found in the Pennsylvania and Santa Fe accounts. In net railway operating income Pennsylvania would gain 1.4% and Santa Fe 1.0%. (R. 1402-1403) Were the order permitted to stand, \$7,000,000 of Minneapolis' revenue, 35% of its total, would become vulnerable, and a persuasive showing was made that \$1,100,000 of this amount would be diverted. (R. 1114-1117, 1156-1157, 1356-1357, 1611-1612; Ex. H-32, R. 1755-1767, 1166)

Minnesota and South Dakota expressed the fear that such diversion "... would further reduce the already thin cushion which enables the M. & St. L. to provide needed service on thin-traffic lines ...". (R. 1437, 1167)

Both States emphasized the importance to their agriculture and commerce of an effective Peoria gateway. The States' expert witnesses cited economic motivations for their confidence that Minneapolis would develop and foster the Peoria gateway and that Pennsylvania-Santa Fe would continue their competitive preferences for the long haul. (R. 1167-1170, 1435-1438) The importance of the Peoria gateway in national defense could not be overstated, according to Minnesota's expert, because the Soo locks and the great Chicago industrial and transportation complex constitute strategic targets of high priority. (R. 1440)

Neutrality among connecting carriers was invoked by both the Commission and the defendants' motions in this Court to breathe life into the meaningless standard of independence. The contention is that the Pennsylvania-Santa Fe application should be preferred because it would preserve Western's neutrality among connecting carriers. The Commission saw a "built-in" assurance that Pennsylvania would insist upon equality with western connections and Santa Fe with those in the east (R. 46). Unexplained is the Commission's preference for this highly theoretical assumption against the reality of actual history. This very built-in assurance was operative during three decades of Pennsylvania-Burlington ownership which were catastrophic for Western as well as the Peoria gateway connections.

The testimony unequivocally established that Minneapolis, being entirely dependent upon the Peoria gateway, was determined in its self-interest that service with all carriers connecting with Western be maintained and improved (R. 1102-1104, 1184, 1229-1234). The successful applicants also undertook to maintain neutrality with connecting carriers; as they expressly testified, they did so in their own self-interest and in fear of retaliation were any other course adopted (R. 483-484, 546, 572). If that automatic safeguard is operative when the owners are the most powerful carriers, originating the greatest tonnage in America, how much more effective is it with respect to a small carrier dependent largely on bridge traffic. This economic fact of life is underscored by the powerful influence exerted by the originating carrier upon the routing of traffic.<sup>12</sup> (R. 1113-1114) The very fact that Minneapo-

<sup>12</sup> The President of Santa Fe, in discussing the influence of traffic solicitors on the routing of traffic, testified that "our utmost could really be quite tremendous". (R. 449) Another Santa Fe witness described how he could force the use of Loma rather than Nemo, the junction served by Minneapolis. (R. 1355)

lis is dependent solely upon the Peoria gateway provides an overriding, self-policing guarantee of neutrality with connecting carriers who feed the pipeline of traffic into the gateway and those who carry it out.

To assure neutrality, the Commission imposed upon Pennsylvania-Santa Fe the standard conditions that Minneapolis had in open hearing offered to accept. The Commission concluded, without foundation, that the standard conditions adequate to protect other carriers in the event of control by the powerful Pennsylvania-Santa Fe combine would not be acceptable in the event of ownership by the infinitely weaker Minneapolis. The Commission might well have heeded Santa Fe's shipper witness who expressed preference for service dependent upon economics to that dependent upon commission-imposed conditions<sup>13</sup> (R. 858).

In the same vein, the Commission brushed off the clear, convincing and unchallenged evidence of the telling loss that the Minneapolis would suffer from the Pennsylvania-Santa Fe acquisition. (R. 1103-1104, 1112-1117, 1166-1170, 1254, 1356-1357, 1402-1412) Santa Fe asserted that it would actively solicit Lomax exchange with Western (R. 403, 405) and the reduction in the interchange with

<sup>13</sup> In denying Santa Fe access to St. Louis, the Commission said at an earlier date:

"The policy of railroad managements to obtain long hauls over their lines is too pronounced to warrant a finding that the Santa Fe could, continue, in the slightest degree, to interchange with other carriers any traffic which it would handle to or from St. Louis. Furthermore, a requirement that the applicants maintain present routes or gateways would not prevent the loss of traffic by other railroads now handling such traffic in connection with the applicants via such routes and gateways." *Chicago, B. & Q. R. R. Control*, 271 I.C.C. 63, 163 (1948). This recognition of the doubtful worth of conditions makes particularly pertinent a query as to the Commission's authority to whittle away the Congressional standards on the assumption that conditions in the order would provide substitute protection for the public interest.

the Minneapolis at Nemo is an obvious and natural consequence (R. 496, 1114-1117, 1156-1157, 1356-1357). In contrast, the Commission asserted that the acquisition by Minneapolis would be "extremely harmful to other carriers", naming only the Wabash. (R. 32) The extreme solicitude for that large subsidiary of the Pennsylvania was based on a confused claim of one witness, unsupported by any specific data, figures or estimates, and rendered meaningless on cross-examination. (R. 1270-1271, 1292-1293) As a matter of survival, the Minneapolis could not do otherwise than maintain a policy of neutrality with respect to all connecting carriers. The colossi Pennsylvania and Santa Fe are under far less economic compulsion. Their powerful ability to reward or punish is already all too well known to connecting lines.

By its adoption of the false standard of "independence", by its distortion of the concept of "neutrality" and the disparity of the treatment of the competing applications thereunder, the Interstate Commerce Commission disobeyed the statutory mandate and made a farce of the concept of a comparative hearing.

In the present case even the Commission recognized that the two applications were mutually exclusive. Thus it was a clear case for a true comparative hearing under the *Ashbacker* doctrine. *Ashbacker Radio Corp. v. FCC*, 326 U. S. 327 (1945). According to Professor Davis, "The *Ashbacker* doctrine has a large and complex future." 1 Davis, *Administrative Law Treatise* 576 (1958). That prophesy cannot be fulfilled and the promising doctrine of comparative hearing in the public interest will die in its infancy if an administrative agency may adopt in advance an arbitrary standard that automatically precludes one of the competing applicants. Absent a composite weighing of the

advantages and disadvantages of the competing applications, there can be no comparative hearing and judicial review is rendered impotent.

One additional inference is equally ineluctable. The Congress set up the general and undefined standard of the "public interest" in section 5(2) (b) of the Interstate Commerce Act; that standard, however, was given a substantial degree of clarity, definiteness and meaning by the more specific commands of section 5(2)(c) and the National Transportation Policy. Here the Commission ignored all the more definite commands (as well as the precedents and its own contemporaneous pronouncements) and equated the "public interest" standard almost solely to a self-serving, unreal pronouncement of the successful applicants. If that course of action be not condemned, then it seems clear that the standard is void for vagueness and must be stricken under the Constitution.

## II.

**On many essential issues findings were completely omitted and on others findings were made contrary to undisputed record proof. The Commission failed to provide the findings and explanation for decision required by law.**

Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) contains the clear requirement that

"All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . ."

In the instant case the Commission made no serious effort to present systematic and authentic findings to support

its predetermined conclusion. Particularly in a comparative hearing requiring composite balancing of the attributes of the competing applications, scrupulous regard should be had for the requirement of basic findings of fact underlying the ultimate conclusions and the reasoning in logic and law by which the decision is reached. The report should reflect the weight, if any, given to each significant factor of the competing applications and the considerations which led to the conclusion. *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88, 90, and (dissenting opinion) 125 (1957).

The "ultimate finding" that approval of the Pennsylvania-Santa Fe application is in the public interest is at best a mixed conclusion of law and fact. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) Adequate subsidiary or basic findings that are both clear and complete are required to support the ultimate conclusions. *Colorado-Wyoming Gas Co. v. FPC*, 324 U.S. 626, 634 (1945). Whatever the problem, the evidence must be marshalled in a comprehensive and meaningful fashion and the reasoning must be exposed for an intelligible review by the courts.

The failure of the District Court to enforce the fundamental requirements for a fair administrative hearing makes it necessary that we catalog the most glaring deficiencies:

1. Already noted is the absence of any findings with respect to the economies and improved service proposed by the Minneapolis or the benefits to the national transportation system of strengthening Minneapolis and diversifying its traffic through combination with Western. Indeed, in at least thirteen instances the report cites the position of Minneapolis without drawing any conclusion. The terminology used is "Minneapolis contends", "Minneapolis estimates",



"Minneapolis states", and "Minneapolis insists". (R. 31-36) These factual aspects of the proposed Minneapolis acquisition, on which the Commission failed to make any findings, included (a) the making of direct interchange connections with twelve carriers, eliminating duplicate transfers and shortening schedules, (b) the fact that, of all carriers in the proceedings, Minneapolis alone had no economic incentive other than to maximize utilization of the Peoria gateway, (c) the showing that no one could operate Western with greater economy or better public service than Minneapolis, (d) the fact that the impact of integration on employees would be minimized by transfers to openings generated by attrition, and (e) the enormous economies, specified as to character and amount, which could be realized in the Minneapolis acquisition, thereby providing means for improved service and industrial development.

Nowhere in its report does the Commission evaluate the validity of the recited contentions nor their significance under the ultimate standard of public interest, despite the fact that in no material respect was the supporting evidence contradicted in the record. While the Commission report recites the concern of the States of Minnesota and South Dakota with a denial to Minneapolis of the opportunity for strengthening its operations and facility for service, there is not the slightest indication, by finding or declaration, that any weight was given to this factor.

These shortcomings have their counterparts in all too many Commission reports. Quite recently, in *Boston & Maine R.R. v. United States*, 162 F. Supp. 289, 298 (D. Mass. 1958), appeal dismissed 358 U.S. 68 (1958), the court stated:



"What we do say is that the plan deserves more than the cursory consideration given it by the Commission, for without more detailed findings by it we cannot exercise our judicial function."

There is manifest a breakdown of the statutory scheme for administrative findings sufficiently organized and presented as to facilitate judicial review. Recitals of the positions of the parties and generalizations that fail to come to grips with the fundamental economic factors provide no substitute for a methodical marshalling of the facts and the law. Only from that orderly marshalling can a court determine whether the administrative agency has faithfully carried out the standards and requirements imposed by the Congressional enactment. The Commission should again be reminded that whatever expertise appointment to that body may carry with it, there is no authority to substitute Commission opinions for the statute.

2. The Commission made no findings with respect to the economic motivations of the competing applicants. The President of Western had long regarded his road as a natural extension of the Minneapolis and favored a merger.<sup>11</sup> Minneapolis proved, and President Symes of Pennsylvania conceded on the witness stand, that he also had long regarded Western and Minneapolis as a natural combination. (R. 537-538, 1022) While Minneapolis was negotiating in 1954 for the purchase of Western, friendly interests acquired control of the Monon, a small railroad running roughly north and south in Indiana, so that Minneapolis-Western-Monon could constitute an outer-outer belt line circumventing Chicago. When the President of Pennsyl-

<sup>11</sup> His position understandingly changed after Pennsylvania-Santa Fe entered into a contract to purchase the Western stock. (R. 977-978)

vania heard of this "grandiose scheme", he moved in to buy Western and put a stop to "this nonsense". (R. 1022) The purchase would not only thwart the immediate peril of competition, but as Symes put it, guarantee "the best permanent protection for the Pennsylvania Railroad". (R. 1023) Neither the Department of Justice, nor the Commission, nor the successful applicants have provided the slightest hint as to how permanent protection of Pennsylvania from competition provides even a color of public interest. The specific intent of Pennsylvania to monopolize and restrain competition, established without challenge in this record, received tacit blessing in the Commission's orders and went completely unnoticed in the Commission's findings and report. That omission stands in sharp relief against Pennsylvania's prior demonstration that it could and would curtail competition through the Peoria gateway under similar circumstances. Under much less telling circumstances, the Commission was moved to inquiry and action in the preservation of competition. *ICC v. Baltimore & O. R. R.*, 152 I. C. C. 721 (1929). The unwillingness of the "experts" to enter this fertile area of inquiry can be explained only by a deliberate purpose to sustain a predetermined, artificial standard.

3. The Commission ignored the lesson of history that Pennsylvania jointly with Burlington (a western carrier operating from Chicago to the west) had previously owned Western and permitted it to sink into receivership. *Acquisition by T. P. & W. R. R.*, 124 I.C.C. 181 (1927). The destruction of Western was the natural result of Pennsylvania's self-interest in the competing Chicago and St. Louis gateways which provide the longer hauls and the higher rate divisions. At that earlier stage the Pennsylvania and the Burlington had ample time and opportunity to develop

Western and to build up the Peoria gateway, but as Western itself advised the Commission, "it was against the interest of the controlling companies [Pennsylvania-Burlington] to develop the property because it competed for traffic with their lines."<sup>15</sup> (124 I.C.C. at 187)

In the instant case no showing or findings were made to suggest that there has been any change in the traffic or transportation conditions which would alter Pennsylvania's economic incentives or those of a western carrier. The Commission did not have to speculate as to what Pennsylvania might do in the future; it had only to read what it had done in the past. "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The economic self-interest of the Pennsylvania-Santa Fe group is to use the competing long hauls to St. Louis and Chicago which furnish higher revenues. All of the promises that Pennsylvania and Santa Fe made to each other (and expressly "not for the benefit of others not parties hereto")<sup>16</sup> cannot erase these facts.

4. With respect to the propriety of the purchase price, the Commission rests its approval upon the premise that

<sup>15</sup> When the eight western carriers sought to acquire and dismember Minneapolis, the Commission said:

"As the applicants serving both Minneapolis and Peoria have their own lines to Chicago, it is hardly to be expected that they would make the same use of the Peoria gateway as does the Minneapolis and St. Louis." *Associated Railways Company, Acquisition and Securities*, 228 I.C.C. 277, 325 (1938)

<sup>16</sup> The arrangement between Pennsylvania and Santa Fe for the proposed management of Western is embodied in a contract between them which contains the following provision (Ex. 7-d to Pennsylvania-Santa Fe application, R. 167):

"The Parties hereto, each with the other, and not for the benefit of others not parties hereto, agree that they will exercise their stock ownership of the TP&W to accomplish the following objectives: . . ."

the price to Pennsylvania-Santa Fe "was established on the basis of agreement between a willing seller and a willing buyer". (R. 42) The Commission made no findings, however, with respect to these pertinent price considerations:

(a) A few weeks before they entered into the sale at \$135 per share, the same "willing buyers" entered into contracts with the same "willing sellers" to purchase 52% of Western's stock at \$100 per share. (Exs. 7-f and 7-g to Pennsylvania-Santa Fe application, R. 174-176) Obviously the minority shares would be worth less than majority control. If the Commission had power to approve a price negotiated at "arm's length" in May, 35% higher than the price negotiated at "arm's length" between the very same parties in April, then at a minimum it was incumbent upon the Commission to explore the transactions and to set out the considerations upon which it relied. One of the Commissioners who wrote the report in this case forgot his previous warning that, even in arm's length bargaining, the "desire to eliminate a competitor" may well induce a buyer to pay an excessive price. *Graves Truck Line, Inc., Purchase - Whitworth*, 59 M.C.C. 601, 606-607 (1953) (concurring opinion).

(b) The Commission asserted that if \$135 per share were a proper price for Minneapolis to pay, it would automatically be fair and reasonable for the Pennsylvania-Santa Fe group. (R. 42) Based on the 1954 figures used at the hearing, the Pennsylvania-Santa Fe purchase was predicated on average annual earnings of Western of some \$641,000, whereas the Minneapolis offer to pay the same price was predicated, as a result of the proposed economies, on average earnings of Western of some \$1,279,000, after deducting the payment of interest on the bonds to be sold by Minneapolis to finance the purchase.

(R. 1253-1254) How those two can be equated, the Commission's report does not reveal. Nor was the extent to which the purchase price reflects the vital factor of curtailment of competition explored by the Commission.

The Pennsylvania-Santa Fe motion to affirm seeks to make capital of the fact that in its petition for reconsideration before the full Commission, Minneapolis requested inclusion in the ownership group if the Pennsylvania-Santa Fe application were approved. That request, of course, was made not for investment but as a matter of desperate defense necessity, reflecting the ruinous effect which unfettered Pennsylvania-Santa Fe ownership would have on the traffic and income of Minneapolis.

(c) The price-earnings ratio, embraced in the Pennsylvania-Santa Fe proposal, far outstripped the price-earnings ratios of all other railroads in the United States, as shown by the public markets. Although Western's earnings had risen during the litigation, the price earnings ratio reflected by the purchase price on the date of the Commission's report was considerably higher than that of any blue chip railroad traded on the New York Stock Exchange. It was 41% higher than the Santa Fe ratio and almost three times the Pennsylvania ratio. These data passed unnoticed and their significance was not appraised. In the District Court both the Commission and the successful applicants attempted to shore up the Commission's fallacious conclusions as to the purchase price by decrying the "speculative test of potential earnings". In so doing, they ignored the principle that "the commercial value of property consists in the expectation of income from it", *Galveston, Harrisburg, etc. Ry. v. Texas*, 210 U.S. 217, 226 (1908). To the same effect

are *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 526 (1941); *Group of Investors v. Milwaukee R.R.*, 318 U.S. 523, 540 (1943).

5. On the prospective promotion of the Peoria gateway, the Commission omitted findings of undisputed facts and made findings directly contrary to the sworn testimony of officers of the successful applicants.

(a) No finding was made of the fact that, by the use of competing gateways, Pennsylvania and Santa Fe are in full and complete competition with the Peoria gateway. (R. 398) Conversely, Minneapolis relies exclusively on the Peoria gateway which constitutes its life-line. (R. 27-28, 1011, 1101) The testimony shows that the Minneapolis traffic program was directed toward improved, unified service and added connections to meet the competition through the larger terminals. (R. 1101-1104, 1177-1184, 1229-1234)

(b) Neither Pennsylvania nor Santa Fe has heretofore solicited for the Peoria gateway because economic self-interest has dictated the longer haul through St. Louis and Chicago for Pennsylvania and through Chicago for Santa Fe. (R. 401, 475-476, 479, 528-529, 571, 582) The Commission found that all this would change, that Santa Fe "intends to place Lomax on a parity with Chicago from a solicitation standpoint" and, while "Pennsylvania will continue to solicit its long haul to St. Louis, Effner and Chicago will be on a parity." (R. 34) *This is simply not true.*<sup>17</sup> It runs counter to

<sup>17</sup> Even if it were true, it would be unenforceable and meaningless. The comments about parity were never more than indications of intent, in the guise of benevolent paternalism. They were never commitments and were not in any way binding.

the sworn word of Symes, President of Pennsylvania, who testified that the past solicitation policy had been for St. Louis first, Chicago next, and Effner (for the Peoria gateway) last, and that after acquisition of Western, the policy would not "change very much". (R. 521-522)

Some Santa Fe-Pennsylvania witnesses were less candid. But they all made it clear that parity does not mean equality in traffic solicitation. It is a deceptive term, intended only to express absence of active opposition. The Traffic Vice-President of Pennsylvania explained the term, "We will as heretofore, solicit via the gateway giving us the longest haul, but . . . we will not *work against*" the Western connection. (R. 571) Traffic Vice-President Duffy, of Santa Fe, indicated that parity does not mean equal solicitation (R. 483), and then went on to say that any diversion of traffic from Chicago would come not from Santa Fe's solicitation but only from Western's. (R. 496) He conceded that unrouted traffic would be sent through Chicago for the longer haul, making it perfectly clear where the Santa Fe preference lay. (R. 506)

President Coulter, of Western, appearing as the final witness for Santa Fe and Pennsylvania, actually punctured the whole parity balloon. Putting Effner on a parity with Chicago, he said, would yield no change in the existing policy of benevolence; Pennsylvania would still seek its long haul to Chicago or St. Louis. (R. 1600)

The mental reservations attaching to the term "parity" are illustrated by Gurley's testimony. He expressed the intention of putting Lomax on a parity with Chicago, and Nemo on a parity with Lomax. When asked whether that meant that Nemo would go on a parity with Chicago, he replied excitedly, "no, no, no." (R. 402, 418) To compound the confusion, Gurley's subordinate, Duffy testified that Nemo would cease to be on a parity with Lomax. (R. 496)



Solicitation for Effner by Pennsylvania could add to Western traffic but, as Coulter put it, "they are not going to do it". (R. 1601) Nor does the Santa Fe intend soliciting for Lomax. (R. 1609) Finally, he conceded that "parity" and a "benevolent attitude toward a gateway" are precisely synonymous. (R. 1609) With the semantic covers cut away, the evidence reveals that neither Santa Fe nor Pennsylvania will solicit one pound of freight for Western. (R. 1600-1601, 469, 1287) On the other hand, the traffic organization of Minneapolis, with agencies in 36 cities (in 16 of which Western presently has no representation) would be joined with the Western traffic solicitors to sell Peoria gateway routing. (R. 1185-1186)

At the best, the Commission simply failed to realize that the use of the term "parity" gave no promise of equality of solicitation or any enhancement of Western's traffic. At the worst, the use of that term was a hoax, designed to mislead the Commission. Promotion of traffic through the Peoria gateway is a vital factor in this proceeding. The self-interest of Pennsylvania and Santa Fe weighs heavily against such promotion.<sup>19</sup> The self-interest of Minneapolis is to maximize the use of the Peoria gateway. The finding of the Commission that Pennsylvania and Santa Fe intend to promote traffic through the Peoria gateway is contradicted by the testimony of their own witnesses as well as by their own economic incentives.

<sup>19</sup> Atkinson of the Wabash, Pennsylvania's huge subsidiary, made it clear that Pennsylvania's self-interest would be to get the longest haul "and that means St. Louis or Chicago over their own railroad". Only if that were not possible, would Pennsylvania choose between the Effner interchange and the Wabash Logansport interchange (using the Decatur gateway). (R. 1280)

The preference of the two successful applicants for Chicago also contradicts the Commission's conclusion that "Santa Fe and Pennsylvania are just about as well off financially when handling traffic via Western as they would be on the long haul through Chicago". (R. 34) True, there was a self-serving generalization to that effect in the testimony, but if the Pennsylvania-Santa Fe partners were to sustain the notion that their financial advantage lay in the shorter rather than in the longer haul, they had the duty of supplying specific data and figures to establish that startling fact. This Court has long recognized the contrary to be true. In *United States v. Southern Pacific Co.*, 259 U.S. 214, 231 (1922), this Court said:

"Self-interest dictates the solicitation and procurement of freight for the longer haul by the Southern Pacific lines."

Furthermore, the Commission, with its asserted expertise, must have been aware, as is any thoughtful businessman, of the lower incremental costs and the higher margins of profit arising from more intensive utilization of yard facilities such as the two successful applicants operate in the major competing gateways. Subsequent to the Commission's determination, Santa Fe announced the opening of a "high-speed, 'push-button' railroad freight yard" in Chicago (see footnote 3, above). That announced investment of \$20 million in improvements to double the working capacity and to automate and speed-up the facility in Chicago effectively belies the notion of equality for the short haul through Peoria.

(c) The Commission expressed confidence that the Pennsylvania-Santa Fe acquisition would improve West-

ern's car supply. (R. 47) That is, an expression of faith, not fact. The undisputed evidence shows that both lines experienced car shortages in their own operations and that the Minneapolis, as the Commission conceded, was one of the "bright spots" in the country in car ownership and supply. (R. 27, 487, 592, 1233-1237) In terms of bad order ratio, reflecting the portion of the freight car fleet in disrepair, Minneapolis' 1955 experience was two to three times more favorable than Santa Fe and five to ten times more favorable than Pennsylvania. (R. 1238)

(d) Similarly unwarranted is the Commission's confidence that "the backing of the Santa Fe and Pennsylvania" made Western's industrial development prospects bright. (R. 46) Both carriers expressed preference for the location of industry on their own lines so as to yield the greatest revenues. Traffic Vice-President Duffy of Santa Fe and Traffic Vice-President Carpi of Pennsylvania each made it crystal clear that he would bring an industry to Western only if he could not locate it on his own line. (R. 493-494, 583, 584)

6. The findings of the Commission with respect to shippers and local officials brought to the witness stand by Pennsylvania-Santa Fe omit any consideration of the following undisputed facts:

(a) The witnesses were assembled as part of a large-scale publicity and promotional campaign. (R. 458, 626, 637, 644, 674, 748-750, 800-801, 802, 884, 1505-1507) Cross-examination revealed that the witnesses had not been advised, and, with one or two exceptions, were not even remotely aware, of the considerations underlying the Minneapolis application. (R. 615)

626-627, 659, 669, 751, 791, 822) A baker's dozen of these assembled witnesses cited the abandonment of the Iowa branch of Western as the basis for opposing the Minneapolis application—although, as the Commission expressly found, Minneapolis has no intention of abandoning that west end branch. (R. 615, 750, 759, 773, 846-847, 861-862, 923, 929-930, 958, 962; 31)

(b) All of the shippers testified that their interest was solely in good service. Not one expressed opposition to the elimination of duplicate facilities, the acceleration of train service by the addition of more trains and connections. Every shipper who had ever used Minneapolis testified to the excellence of its service and his satisfaction with the way Minneapolis operated. (e.g., R. 614-615, 627, 732, 775, 853, 862, 871) A mine owner called to support the Pennsylvania-Santa Fe application admitted that Western had experienced shortages of coal cars and that Minneapolis had kept his competitor supplied. (R. 669)

(c) Finally, the Commission erred in failing to recognize that its treatment of the testimony of the shipper witnesses should have been confined to the economic substance of that testimony. Instead, the Commission concentrated on the number of witnesses produced by the free-spending Pennsylvania-Santa Fe promotion as though the proceedings before it were a popularity contest. In a more responsible vein, the Commission recently pointed out that the burden of proof upon the applicant and the responsibility of expert inquiry by the Commission are in no respect lessened by the absence of protests or intervenors. *Transcon Lines—Purchase—B&M Express, Inc.*, 70 M.C.C. 796 (1958).

7. The Commission denigration of the Minneapolis program of integration, because it would result in the replacement of some employees, ignored controlling considerations with respect to which no findings were made nor explanation offered:

(a) Integration and economy are express aims of the National Transportation Policy, and these aims can seldom, if ever, be accomplished without a reduction in employment. They can, however, be accompanied by a protective cushioning program such as the program offered by Minneapolis in the present case. (R. 289, 1032-1033, 1078-1079, 1186, 1220, 1229, 1242, 1377, 1397) Both the Commission and the courts have approved acquisitions designed to effect economies and better utilization of facilities, even though employment is reduced and a headquarters moved from a particular community. *City of Nashville, Tennessee v. United States*, 155 F. Supp. 98 (M.D. Tenn. 1957), *aff'd*, 355 U.S. 63 (1957).

(b) The only true ultimate guarantee of job security lies in economic, efficient, profitable operations such as proposed by Minneapolis, with emphasis on augmented and improved service through the Peoria gateway. Featherbedding cannot last forever, and jobs cannot be secure when based on uneconomical operations. Nor can job security be invulnerable to a drying up of the gateway.<sup>20</sup>

<sup>20</sup> The vulnerability of railroad jobs to a decline in traffic volume is shown by the recent history of the industry. During the 25 years preceding 1958, railroad employment declined from 1,857,674 to 861,928.

<sup>21</sup> For the 5 years ended March 1958, there was an average decrease of 5,800 employees per month. (Sen. Rep. 1647, 85th Cong., 2d Sess. 8 (1958)). If this trend is to be reversed, and if the railroads are to

(c) Minneapolis explained fully how minimal the impact on the employees would be because of the time consumed in integration, the transfer to vacancies arising from attrition, the full observance of the Washington Job Protection Agreement of 1936, and other factors. (R. 1032-1033, 1078-1079, 1186, 1220, 1229, 1242, 1377) At the outset, Minneapolis voluntarily offered to abide by the Washington Job Protection Agreement, assuring displaced employees a minimum of 60% of their regular compensation for a period up to five years and permitting an employee to obtain a separation allowance amounting, in the case of seniority of five years or more, to twelve months' pay. (R. 289) These undertakings are designed both to assist affected employees and to encourage the carrier to minimize displacement and provide substitute employment wherever possible. While the Commission noted that 256 jobs would be affected by the integration, it ignored the fact that the actual displacement would be only a small fraction of that total.<sup>21</sup> This expectation rests upon the firm ground of experience: The mechanization of the Minneapolis accounting department yielded a sizeable reduction in the number of jobs, but by careful utilization of attrition vacancies, all of the incumbents were transferred to other Minneapolis positions, except for two or three who moved to other railroads. (R. 1032-1033)

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secure their fair share of an expanding economy, more economical and efficient operations must be sought. When that is ensured, true employment will increase to take care of the increased business. Retention of employees in unnecessary, duplicating positions can only be self-defeating in the long run.

<sup>21</sup> A detailed schedule disclosed that during the period of integration a considerable number of job openings would become available through normal attrition, including the retirement of many of the 350 Minneapolis employees then aged 60 or over. (Ex. H-44, R. 1917-1924, 1379)

8. The Commission made no findings of fact with respect to any of the elements to be considered on the key issue of the violation of section 10 of the Clayton Act (15 U.S.C. § 20). It did not report the interlock nor identify the interlocking directors. It made no findings with respect to the preference which Pennsylvania-Santa Fe enjoyed in the negotiations as a result of the interlocking directorate. It made no finding with respect to the exclusion of Minneapolis from the negotiations as a consequence of the interlocking directorate relationship. Finally, if section 5(11) of the Interstate Commerce Act (49 U.S.C. § 5(11)) could be read—we think misread—to permit condonation of a past violation of section 10, the Commission failed to make any findings of the considerations in the public interest which would warrant such condonation.

9. The findings with respect to anti-competitive consequences of the Pennsylvania-Santa Fe acquisition were wholly inadequate to sustain the grant of immunity from antitrust prosecution.

(a) The Commission report does not mention either section 1 of the Sherman Act (15 U.S.C. § 1) or section 7 of the Clayton Act (15 U.S.C. § 18), or indicate how the Pennsylvania-Santa Fe proposal could possibly be reconciled with the statutory interdictions.

(b) Although the Commission discussed (without findings) some possible consequences *within the Peoria gateway*, it gave no consideration to the power of the two railroad colossi to cut off competition *by drying up the Peoria gateway in its entirety*, and their economic incentive so to do. The record is devoid of evidence and findings that they could not and would not do so and



would not profit by sending traffic through their larger gateways precisely as the Pennsylvania and Burlington had done during the many years they owned Western.

(c) The Commission placed great weight upon the fact that Pennsylvania and Santa Fe are Western's two largest connections. (R. 46) How assignment of control of Western to such connections equates with the public interest is not explained. This non sequitur is particularly significant since the Commission's own findings make it abundantly clear that Western's business—the very interchanges with Santa Fe and Pennsylvania—were obtained primarily through the aggressive solicitation of its own traffic department, in active competition with the solicitation by Pennsylvania and Santa Fe for their long-haul gateways. (R. 35) And, by way of contrast, there is the aggressive solicitation for Peoria gateway routing by Minneapolis: (*e.g.*, R. 27-28, 284, 1011)

(d) The Commission accepted at face value the successful applicants' easy assurance that Western's aggressive traffic solicitation policies would be continued. Yet that assurance, conflicts with their own self-interest, and, as we have pointed out above, derives solely from a private agreement between the two partners, which by its express terms was not for the benefit of, or enforceable by, any outside party. The Commission thus rested its ultimate standard of public interest upon the shifting sands of a private arrangement between the two partners completely beyond the control of the Commission, shippers or other carriers.

In similar circumstances, the Commission has shown itself to be less naïve. *ICC v. Baltimore & O. R. R.*, 152 I.C.C. 721, 735-6 (1929). Rejecting the Santa Fe

bid for a St. Louis gateway, the Commission thought that even a condition of the order—as distinguished from a pious promise revocable at will—would not “maintain present routes or . . . prevent the loss of traffic by other railroads”. *Chicago, B. & Q. R. R. Control*, 271 I.C.C. 63, 163 (1948)

Time and again the Commission selected a single element upon which to predicate a finding, without taking into account the total record. This presents a facade of plausibility but does not conform to the command of this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951):

“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”

Compliance with the Administrative Procedure Act in terms of both adequate findings and regard for the totality of the record would have rendered impossible the conclusion reached by the Commission.

### III.

**The purchase of Western shares by Pennsylvania constituted a direct violation of section 10 of the Clayton Act which the Commission and the District Court were powerless to condone.**

Section 10 of the Clayton Act prohibits any carrier from having any dealings in securities, articles of commerce or contracts amounting to more than \$50,000 in any one year with a corporation with which it has directors or managing officials in common, except upon competitive bidding under regulations prescribed by the Commission.

The statutory prohibition is comprehensive in scope and absolute in terms. Absent competitive bidding, the dealings in the stock of Western between Pennsylvania and Wilmington Trust Company fall squarely within the ban of the statute. The record discloses that during the pertinent period, Lamot duPont Copeland, a director of Wilmington Trust Company, was also a director of Pennsylvania and a wholly-owned subsidiary of Pennsylvania. Three other directors of Wilmington Trust Company were concurrently directors of wholly-owned subsidiaries of Pennsylvania.

That the control of competitive bidding may lie in other hands does not relieve the carrier of the ban imposed by the statute. *In re Missouri Pac. R. R.*, 13 F. Supp. 888 (E. D. Mo. 1935) The Missouri Pacific Railroad had there entered into a contract for the instalment purchase of securities from a subsidiary of Allegheny, with which the carrier had a director in common. During the receivership, the Reconstruction Finance Corporation sought to annul the contract as violative of section 10 of the Clayton Act. Holding the transaction invalid and subject to rescission, Circuit Judge Faris said (13 F. Supp. at 892-893):

"Counsel for the debtor contend that the proviso as to competitive bids covers securities, and that if in the very nature of the situation bidding for the sale of securities is not possible—and they insist it was not here possible—then the statute has no application, and one corporation may freely buy securities from another regardless of interlocking directorates and regardless of the statute. To my mind such a construction utterly destroys the beneficent intention held in mind by Congress when it passed the Clayton Act, of which section 10 is a part. As forecast, I think it rather clearly provides that when interlocking directorates exist between a railroad which is engaged in

interstate commerce, and another railroad, or corporation, then unless competitive bids are obtained, such corporations are forbidden to deal with each other. And if, as already said, in the situation existing here, no competitive bids are possible, then the statute forbids the deal absolutely. If this is not what Congress intended, then Congress did a vain and futile act when it enacted the statute, so far as concerns the control of the buying and selling of securities, and as is known by all men such buying and selling has long constituted a crying financial evil in railroad annals." (Emphasis in original)

In the instant case the Commission held that because the final contract was taken only in the name of Santa Fe—which thereafter assigned one-half of the shares to its partner, Pennsylvania—"the issue before us does not involve a purchase by the Pennsylvania from the Wilmington Trust". It held further that upon approval of the transaction, section 10 of the Clayton Act became inoperative under the terms of section 5(11) of the Interstate Commerce Act (R. 44)

The District Court completely rewrote the statute saying (1) bidding was not required because this is not "a situation where interlocking directors may be enriched by reason of dealings in their securities", (2) "the common directorate which existed between the Wilmington Trust Company and the Pennsylvania Company was not the kind intended by the Congress to be covered by the prohibition", and (3) the statute "does not appear to cover the sale of stock held by a trust company to a common carrier." (R. 98-99) How the plain language of the statute could be twisted into such tortured knots of interpretation is a mystery into which neither the District Court nor any of the appellees has ventured to delve.

The motions to affirm previously filed in this Court depart from the reasoning of both the Commission and the District Court. The Pennsylvania-Santa Fe motion denies that Pennsylvania engaged in "dealings in securities". The Department of Justice—I.C.C. motion asserts that section 10 of the Clayton Act was designed "to prevent a railroad from buying at too high a price" and that the Commission had here expressly found the purchase price to be reasonable.

**A. The negotiation and execution of the contracts for the purchase of Western's stock constitute prohibited "dealings in securities" between a carrier and a corporation having directors in common.**

With respect to dealings in securities—the precise language of the statutory prohibition—the record establishes three facts, each of which is sufficient to taint the transaction with a badge of illegitimacy:

1. Pennsylvania and Wilmington Trust Company carried on active negotiations with respect to the acquisition of the Western shares. In fact, the President of Pennsylvania testified that he was approached by Wilmington Trust Company at the outset, and that he was interested but wanted no part of any competitive negotiations. (R. 512, 529, 535)

2. By letter agreement of April 15, 1955, Wilmington Trust Company agreed to sell 26% of the Western stock to the Pennsylvania Company, a wholly-owned subsidiary of Pennsylvania, at a price of \$100 per share. Concurrently a similar agreement was made with Santa

Fe. (Exs. 7-f and 7-g to Pennsylvania-Santa Fe application, R. 174-176)

3. The May 26, 1955 agreement for the sale by Wilmington Trust Company and its co-trustee of their Western stock to Santa Fe at \$135 per share was followed shortly by the agreement of Santa Fe to sell one-half of the shares so acquired to the Pennsylvania Company. (Exs. 7 and 7-d to Pennsylvania-Santa Fe application, R. 150-153, 165-169) This was a continuation of the joint venture, reserving to Pennsylvania its rights against the McNear trustees.

These contracts and the negotiations leading up to them adequately bring the conduct of Pennsylvania and Wilmington Trust Company within the statutory prohibition of dealings in securities. At least one of the successful applicants agrees. On April 14, 1958, Pennsylvania Company instituted suit against the trustees of the McNear trust, seeking specific performance of the April 15, 1955 contract to sell 26% of Western's stock at \$100 per share, or, in the alternative, damages for the breach of that contract in the amount of \$819,000. *Pennsylvania Company v. Wilmington Trust Company*, Civil Action 969, Court of Chancery, New Castle, Delaware. That lawsuit is presently pending.

The suggestion by the appellees that section 10 reaches only a consummated purchase of securities runs afoul of the statutory language. Had Congress intended such restricted scope, it could hardly have couched its purpose in less appropriate language. The selection of the term "dealings" evidences an intent comprehensively to encompass all business activities with respect to the enumerated subject matter. This Court has recently given to the statu-

tory term "dealing" a broad connotation. *NLRB v. Cabot Carbon Company*, — U. S. —, 3 L. Ed. 2d 1175, 1180-1182 (1959).

Nor is there any basis for assuming that the adequacy of price was the sole consideration to which Congress addressed its attention. Public bidding opens the transaction to a wholesome public scrutiny not attendant upon back-room deals. In any event, Congress specifically prescribed the method by which related corporations might deal with one another. That is competitive bidding under prescribed regulation. The statute leaves no room for substitution of other procedures, even though undertaken in good faith and for proper purpose—virtues not here readily apparent.<sup>22</sup> This record is testimony to the wisdom of the Congressional enactment and to the scope of its prophylactic purpose. The negotiations reveal an unusual anxiety by the corporate trustee to sell the shares held in the trust estate to Pennsylvania and its partner, Santa Fe. There was an absence of the normal process of pitting prospective buyers against each other in an effort to obtain the highest possible price. While we are not here concerned with the fiduciary conduct of Wilmington Trust Company as trustee, the circumstances reveal the extraordinarily close relationship between the corporate trustee and Pennsylvania, which may reasonably be attributed to their interlocking directorates.

The consideration of section 10 by the tribunals below was shallow and inhospitable. The Commission thought

<sup>22</sup> The government argued that the purchase was "remote" from the evils against which Section 10 was directed" because it was subject to approval by the Commission entailing a determination that the purchase price was reasonable (Motion to Affirm, p. 11). No authority is cited for such limited statutory purpose or to warrant the after-the-fact substitution of Commission review of price for the unequivocal statutory bidding procedure.



that taking the second contract in the name of Pennsylvania's partner, with a subsequent division of the shares, shielded the transaction from the statute. Equally transparent is the District Court's rewriting of the statute and its intimation that evasion might have been accomplished by Pennsylvania's acting through its wholly-owned subsidiary.<sup>23</sup>

The unpleasant odor of such intimations is not dissipated by the suggestion made by the Department of Justice to this Court that there is at most a technical breach of section 10. Rather, this case presents, with all the ugly brush strokes highlighted, a vivid picture of the nation's largest railroad carrier using the influence of an interlocking directorate to crush the natural expansion of a small carrier—and doing that for the deliberate purpose of suppressing competition. The purpose and effect have been to flout the public policy of the antitrust laws.

Apart from the legal authority to condone a violation of section 10 is the warrant for the exercise of a purported discretion by the Commission. Immunization from antitrust laws may not be conferred by edict or fiat, unaccompanied by disclosed considerations in the public interest dictating such exercise of discretion. Here the Commission was called upon to determine whether a transaction conceived in illegality and dedicated to the suppression of competition, was so vital to our national transportation system that the violators of the law should be clothed with

<sup>23</sup> Their application itself shows that the successful applicants were quite realistic on both counts (R. 129-130):

• "1. The proposed transaction for which approval is sought is the *joint acquisition* of control of TP&W by Santa Fe and Pennsylvania Railroad through purchase of its capital stock in equal amounts by Santa Fe and by Pennsylvania Company, a wholly-owned subsidiary of Pennsylvania Railroad." (Emphasis supplied.)

immunity to preserve their illegal gains. No such overriding public interest appears in the record or the findings.

In two recent instances, the Commission refused to stamp with approval acquisitions that had been made in violation of law. In one, the Commission refused to permit the applicant to retain "the fruits of its unlawful conduct," for to sanction such conduct would be to encourage and welcome disregard of the law by others. *Central of Georgia Ry. Control*, 307 I.C.C. 39 (1958). The basic principle enunciated in that case was:

"The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law."

With respect to the acquisition of a truck facility, the Commission held that transactions rooted in illegality "should not be blessed by approval". *L. Nelson & Sons Transportation Co.—Control and Merger—Gilbertville Trucking Co., Inc.*, 75 M. C. C. 45 (1958).<sup>21</sup>

**B. The Interstate Commerce Commission is without authority to condone antitrust violations occurring prior to the entry of the Commission's order.**

The present transaction cannot be immunized from the interdiction of section 10 of the Clayton Act. Section 5(11) of the Interstate Commerce Act is designed to facilitate the consummation of transactions approved by the Com-

<sup>21</sup> These decisions are in complete accord with the history of Sherman Act enforcement, where this Court has been vigilant to see that, "Those who Violate the Act may not reap the benefits of their violations" or avoid an undoing of their unlawful projects. *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189 (1944). *Schine Chain Theatres v. United States*, 334 U. S. 110, 128 (1948). *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 152 (1948).

mission. Carriers are relieved from the operation and restraints of the antitrust laws "insofar as may be necessary to enable them to carry into effect the transaction so approved." We are here concerned not with an offense against the antitrust laws in carrying out a transaction approved by the Commission, but rather a violation antedating the proceedings before the Commission.

Pennsylvania had carried on its dealings in securities in disregard of the Clayton Act. Thereafter the transaction rooted in illegal conduct was brought to the Commission for its approval. The statute may be searched in vain for authority to confer retroactive condonation of such violation.

By its very terms the statute operates *in futuro* and not in retrospect. The exception to the antitrust laws is precise and limited. There is no authority to purge the taint of a transaction illegal at the time it was brought to the Commission.

Construing an earlier statutory version of what is now section 5(11), Commissioner Eastman said, in a concurring opinion:

"Plainly there is nothing in this provision which in any way modifies the antitrust statutes, and nothing which suspends their operation until we have made an order. In that event the operation of these statutes is suspended with reference only to *future* acts authorized or required by the order. In no way is it suspended with reference to unauthorized acts pending our subsequent approval or disapproval, such suspension to continue if we approve and to cease if we disapprove. If that had been the intent of Congress it could very easily have been expressed, but there is no language which even remotely suggests such an intent." *ICC v. Baltimore & O. R. R.*, 152 I.C.C. 721, 740 (1929)

## IV.

The Pennsylvania-Santa Fe acquisition was specifically designed and calculated materially to restrain competition between the Peoria gateway and the major east-west gateways of St. Louis and Chicago, and to afford monopolistic power to the successful applicants in their own service areas. Immunization of the acquisition from the operation of the antitrust laws was an abuse of the Commission's statutory power.

The order under review, carrying with it under section 5(1) of the Act, immunization from the antitrust laws in its consummation, cannot stand in the absence of clear-cut transportation advantages to the general public of such character and magnitude as to outweigh the public harm attendant upon violation of the antitrust laws. The vice of the order here assailed is the absence of consideration of the nature and scope of the antitrust violations, particularly in respect of the east-west gateway competition, the failure to cite any benefits to the public outweighing the destructive effect upon competition of the Pennsylvania-Santa Fe acquisition, and the availability of the alternative Minneapolis application that promotes both the transportation and the antitrust policies of the Congress.

Section 1 of the Sherman Act prohibiting contracts and combinations in restraint of trade, and section 7 of the Clayton Act prohibiting acquisitions of stock or corporate assets where the effect may be substantially to lessen competition or to tend to create a monopoly, are both offended by the successful applicants in two major respects. The first is a restraint of trade, lessening of competition and monopolization in east-west gateways. This element the Commission did not consider at all. The second relates to

the effect upon commerce in the respective service areas of Pennsylvania and Santa Fe." This the Commission touched upon lightly with neither comprehensive survey nor decisive determination. The Commission apparently felt, as the District Court held, that "It is not the function of the Commission to determine whether the acquisition of Western by these two railroads will violate the antitrust laws." (R. 101) The Court then noted, what is perfectly true, that the Commission made no effort to conduct such an inquiry. The Commission simply abdicated its duty to consider free competition as a pertinent factor in the public interest.

The Commission apparently did not realize how intimately its functions are touched by the antitrust laws. The Commission could determine public interest only by accommodating the reach of the antitrust laws with that of the Interstate Commerce Act. With respect to carriers, the Commission has a statutory duty to enforce section 7 of the Clayton Act and other antitrust provisions. Its responsible concern with free competition is an essential concomitant of the immunity from antitrust laws attendant upon compliance with the Commission's orders. We had thought it clear that due regard for antitrust consequence was a duty transcending the Commission's discretion. *McLean Trucking Co. v. United States*, 321 U.S. 67, 86 (1944). Neither transportation policy nor protection of free competition occupies a superior position in the public interest. If the Commission is to function with an eye single to that public interest, these two fundamental policies must be accommodated, one to the other, on the basis of candid and rational reasons. In effecting that statutory accommodation, it was necessarily incumbent upon the Commission to consider the alternative application of Min-

neapolis which would further the National Transportation Policy and at once conform to the antitrust laws.

Pennsylvania, the nation's largest carrier, enjoys a pre-eminent position in the St. Louis and Chicago gateways, and, through its subsidiary, the Wabash, in the Decatur gateway. Santa Fe occupies a preeminent position in the Chicago gateway which, since the hearing before the trial examiner, has been enhanced by a huge, modern transfer facility. Both carriers aggressively compete with Western. (R. 398) In addition to that competition, the President of the Wabash testified that his railroad ran parallel to Western across the State of Illinois, at times running "side by side." (R. 1288-1289) The competition is so direct that improved service over the Wabash to Kansas City diverted traffic previously handled over Western and Santa Fe. (R. 1294) Among all the carriers in the United States, Pennsylvania and Santa Fe are two of the largest originators of traffic, and, as such, are able to exercise a tremendous influence over the routing of traffic. To allow control of a competing gateway—Peoria—to pass into the hands of the Pennsylvania-Santa Fe combine would place them in a powerful position to strangle Peoria gateway competition to the advantage of their preferential positions in Chicago, St. Louis and Decatur. That the fear is not idle is apparent from the admission by the President of the Pennsylvania that "we could destroy" the Effner connection.<sup>25</sup> Lurking in the record, too, is the historical fact that for a third of a

<sup>25</sup> Speaking of the Effner interchange at the east end of Western, President Symes testified: "That is what I mean when I say we made it, if anything here does harm to it, we could destroy it. That is not a threat, I don't mean it that way but I could very well do it from the standpoint of economics." (R. 547) While the President of the Santa Fe anticipated no bad relations with Western if his application were disapproved, he took occasion to warn that the possibility "should not be disregarded." (R. 434)

century the Peoria gateway did in fact dry up to the benefit and enhancement of Western's then owners' preferential interests in the competing gateways.

Many years ago this Court analyzed and condemned the very evils which the Commission and the District Court have here elected to sanction. In *United States v. Southern Pacific Co.*, 259 U.S. 214, 230 (1922), the Court stated:

"Such combinations, not the result of normal and natural growth and development, but springing from the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected."

This principle was then applied to the very considerations which will inevitably influence the Pennsylvania-Santa Fe group in the instant case:

"Self-interest dictates the solicitation and procurement of freight for the longer haul by the Southern Pacific lines. While many practices, formerly in vogue, are eliminated by the legislation of Congress regulating interstate commerce, and through rates and transportation may be had under public supervision, there are elements of competition in the granting of special facilities, the prompt carrying and delivery of freight, the ready and agreeable adjustment and settlement of claims, and other elements which that legislation does not control." (259 U.S. at 231)

Ill-concealed by the loose references to parity and benevolence is the fact that Santa Fe and Pennsylvania promise only to lessen their resistance to Western's solicitation for the Peoria gateway. But as the Commission's order stands,



Western's solicitation will be controlled by these very carriers. Can it be assumed that their own economic self-interests will actually be submerged and sacrificed? Would Santa Fe be content with 52% of the revenues on a shipment routed through Lomax which would yield Santa Fe 70% if routed through Chicago, even if one-half of the difference, remaining after expenses, could be realized through ownership in Western? Or would Pennsylvania be content with 26% of the revenues on shipments routed through Effner which would yield Pennsylvania 50% if routed through St. Louis, and would yield the combined Pennsylvania-Wabash 70%; even if some 11%, less expenses, were realized through ownership in Western? These queries are predicated upon the specific divisions for various traffic routings shown in the first table of Exhibit H-34. (R. 1769-1816, 1166) Economic self-interest and human nature being what they are, the Western traffic organization will be responsive to the best interests of the owners of Western. No Western solicitor would dare buck either Pennsylvania or Santa Fe in routing solicitation. Unless we are to retreat to Alice-in-Wonderland fantasy, we must face the fact that the self-interest of the controlling carriers will be a primary consideration in traffic solicitation. The gateways which yield them the greater return will necessarily be favored over the competitive route of Western.

In *ICC v. Baltimore & O. R. R.*, 152 I.C.C. 721, 735, 736 (1929), the Commission pointed out that (a) the effective competition in the solicitation of the acquired carrier could not survive the acquisition because "knowledge of its relationship to its controlling lines would deprive it of force as a competitor for their traffic", and (b) the motivation of the acquiring carriers "to prevent the consumma-

tion of the plans for a competing through system" should not be ignored.

The Commission has here deviated from the realistic standards by which it has tested previous comparable situations. *Chicago, B. & Q. R. R. Control*, 271 I.C.C. 63, ¶62-163 (1948); *ICC v. Baltimore & O. R. R.*, 152 I.C.C. 721, 735-736 (1929). Recently the District Court quoted with approval certain statements of the Commission rejecting the applications of Northern Pacific, Great Northern and Milwaukee to acquire the Spokane International Railroad. *Canadian Pacific Ry. v. United States*, 158 F. Supp. 248, 253-254 (D. Minn. 1958). These statements are equally apposite here. When the word "Western" is substituted for the words "Spokane International", they read:

" . . . Such ownership, involving as it does the principal competitors of the Western, would result in a conflict of interests which inevitably would lead to a stalemate in matters of policy, solicitation of traffic, physical improvements; and industrial development. The competitors would be more interested in their wholly-owned lines than they would be in the part ownership of the Western. Divided ownership and responsibility, particularly where the interests of those in control may be somewhat opposed, would not be conducive to harmonious results. Any plan calling for control by its competitors offers little or no prospect that the Western's properties would continue to be operated vigorously in the solicitation of rail traffic as they are now. . . . "

The motives of the Pennsylvania-Santa Fe group did not concern the Commission although the evidence was clear, convincing and uncontradicted. (R. 454-455, 533, 535, 539-540, 597, 1022-1023) Even the most ingenuous of optimists ought to be convinced by the admission made by President Symes of Pennsylvania under oath that his pur-

pose in seeking control of Western was to block the competitive outer-outer belt line around Chicago.<sup>26</sup>

The Commission, the District Court and the appellees are unanimous in their disregard of the competition-stifling intent of Pennsylvania and the history of the negotiations. If the mere suspicion of a scheme to suppress competition was sufficient to evoke disapproval in the *Baltimore & O. R. R.* case, how much more forceful is the demand for judicial condemnation in the present case, where the pernicious purpose was admitted under oath by the prime movers.

The duty of the Commission with respect to granting immunity under the antitrust laws was spelled out by Mr. Justice Rutledge, speaking for this Court in *McLean Trucking Co. v. United States*, 321 U.S. 67, 86-88 (1944):

"Congress however neither has made the antitrust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to *make certain that the former was permitted only where appropriate to further the national transportation policy*, it placed in the Commission power to control such developments.

\* \* \* \* \*

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of the competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower

<sup>26</sup> The President of the Santa Fe reflected little public interest in his explanation for opposing the Minneapolis when he made the statement already quoted above, that "the brief answer is that we prefer to own it." (R. 455)

costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. . . . If the Commission did not exceed the statutory limits within which Congress confined its discretion *and its findings are adequate and supported by evidence*, it is not our function to upset its order." (Emphasis supplied)

In quoting from that opinion, neither the District Court nor any of the appellees has seen fit to include the first sentence quoted above. The obligation prescribed by this Court required the Commission to bring into rational focus the full thrust of both the National Transportation Policy and the antitrust laws. In doing so, the Commission may not deny hospitable acceptance to the antitrust laws nor may it substitute its own conclusory evaluation of competitive requirements for the dictates of those laws and the National Transportation Policy.

In its report the Commission did concede that the effect of the Pennsylvania-Santa Fe acquisition might be "some diversion of traffic". (R. 34) The Commission, however, was addressing itself solely to the narrow effect as among the several carriers within the Peoria gateway. What it failed to consider was the more important, much broader, question of the future of the Peoria gateway itself if entrusted to the powerful carriers whose primary interests lay elsewhere. The Commission ignored the fact that its order would place it within the unrestrained power of the Pennsylvania-Santa Fe group substantially to lessen the traffic through the Peoria gateway, for the benefit of the competing St. Louis and Chicago gateways, which, at least in respect of the Pennsylvania, was the very purpose of the acquisition. It is in this vital, sensitive area of the natural working of economic forces that the Commission was called upon to exercise the highest level of expertise analysis.

and it is in this very area that the greatest vacuum exists in the Commission's report.

A second aspect of the competitive problem, equally ignored by the Commission, is the over-all effect upon transportation of linking, and enlarging the sphere of influence of, two gigantic rail empires. The greatest tonnage in the east is captive to Pennsylvania; the greatest tonnage in the west is captive to Santa Fe. Their influence upon other carriers and industry dependent upon their services is monumental. Their traffic solicitation and operating coverage is enormous. Against this background, any enhancement of their competitive power increases the pressure upon, and the jeopardy to, their competitors in rail and other transportation. When it is remembered that the proposed addition joins these two giants, the perils are necessarily magnified. By any standard of measurement, the power of these two colossi of the railroad industry is already so tremendous that any further augmentation violates the language, spirit and national policy of the antitrust laws.

The President of Santa Fe insisted that as a matter of general policy "the applicant having the greatest exchange of traffic . . . should be preferred." (R. 384) The Commission wholeheartedly embraced that philosophy to the extreme. It awarded Western to the huge carriers enjoying the heaviest connections even though that traffic was interchanged despite, not because of, such connecting carriers. It made that award in the face of the conflicting self-interests, the condemnatory experience and the destructive competitive purposes. That underlying philosophy jeopardizes fair competitive practices in the transportation industry and is calculated to spill over into other areas. Our way of life does not contemplate that a government agency should make the big, bigger, and the small, weaker.

Since size itself is "an earmark of monopoly power", Pennsylvania-Santa Fe could not sustain their application without an affirmative showing that the antitrust laws would not be transgressed. No such showing was made nor was it possible under the circumstances of this case.

Pertinent is the comment of the Commission in rejecting the application of Santa Fe and Burlington to acquire joint control of a small carrier affording access to St. Louis:

"The fact that two of the strongest railroads in the United States propose to unite in an arrangement whereby they could attract to their lines from competing carriers a large volume of traffic and handle it at favorable operating costs, would, inure largely to their benefit and possibly to the benefit of some shippers, but ultimately, because of the power that might be exercised in an area where competition is so keen the transportation facilities in the entire Southwestern section of the country would probably be adversely affected. Traffic losses of other carriers, including the protesting railroads, unable to compete with such a powerful combination, might be so great as to result in curtailment of service or abandonment of substantial portions of their lines, either of which would be detrimental to the public interest." *Chicago, B. & Q. R. R. Control*, 271 I.C.C. 63, 162-163 (1948).

Promises to avoid such detriment, even if buttressed by conditions in the order, were regarded by the Commission as inadequate against the normal incentive of carriers for the long haul.

Santa Fe and Pennsylvania are both in active competition with Western. The power and self-interest of the successful applicants in curtailing competition with Western so as to promote their preferential long hauls is undeniable. It happened before, and it is not illogical to antici-

<sup>27</sup> *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 174 (1948).



pate a repetition. The Commission has found that "mere representation" of one carrier on the board of another would "destroy the latter's neutrality", and may "substantially lessen competition," *New York, Chicago & St. L. R. R. Control*, 295 I.C.C. 131, 148 (1955). The consequences of control of a competitor are more far-reaching in terms of service, traffic data and solicitation. Mere access to Western's interchange reports would yield valuable competitive information as to the types, sources, volume and destinations of traffic moving via Western in conjunction with other connecting carriers. There is no reason to expect self-restraint on the part of Pennsylvania or Santa Fe in utilizing the competitive advantages in their own service areas which control of the strategic Western line can yield. The reasonable likelihood that the acquisition will result in a restraint of commerce is sufficient to invoke section 7 of the Clayton Act even were competition absent between the parties to the acquisition. *United States v. E. I. duPont deNemours & Co.*, 353 U. S. 586, 592 (1957). It is apparent that, in terms of both gateway competition and traffic competition in the Pennsylvania and Santa Fe service areas, the combination under scrutiny by the Commission would be unreasonably in restraint of trade.

In a proper case the Commission admittedly may determine that antitrust considerations should be subordinated to other considerations in the public interest. In order to make that determination, however, and to make it susceptible to the meaningful judicial review guaranteed by statute, the Commission must spell out the other interests—as it failed to do here. They cannot be assumed or implied from expertise.

No exploration of the antitrust problems could be com-



plete without consideration of the available alternatives. The Minneapolis application was ready at hand. Of all the carriers in the proceeding, Minneapolis alone has no conflict of interest with the Peoria gateway. Its program was calculated to foster and stimulate, rather than to stifle and lessen, competition. It contemplated promoting the use of the Peoria gateway in more spirited competition with the busier terminals. It carried with it, in the public interest, economy, integration and elimination of duplication and waste, improvement and acceleration of service, all objectives underscored in the National Transportation Policy. The Commission's criticism of the Minneapolis proposal on the ground that top management would no longer be located in Peoria has been shown to be a transparent sham in which the Commission can take little pride as an expert.

The record with respect to antitrust considerations required findings by the Commission (1) that the acquisition of Western by Pennsylvania-Santa Fe would, in telling and far-reaching respects, offend section 1 of the Sherman Act and section 7 of the Clayton Act, (2) that the disadvantages of the restraint are hardly overcome, so far as the public is concerned, by the illusory "independence" of Western, and (3) that the allowance of the Minneapolis application would be consistent with, and indeed promote, the national policy for the preservation of free competition.

## V.

**The restrictive consideration by the District Court constituted a denial of judicial review.**

A rubber stamp approval of the Commission's report was sought by the appellees and given in the District Court. The government told the Court that "no case has been

found in which such an order has been held invalid on the merits." (D.C. Brief, Department of Justice and I.C.C., p. 10). The District Court summed up its concept in the extraordinary statement that "within the limits of the jurisdiction conferred upon it, the power of a Court or an administrative agency to decide questions is not confined to deciding them correctly." And then that tribunal applied that approach quite literally.

No invasion of the province entrusted to the Commission was sought in this case. We complained that looking down one side of the street and paying no attention to the other constituted a denial of a comparative hearing and was in keeping with the one-sided approach condemned by this Court in *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (1957), handed down after the Commission had acted.

The whole subject of findings was left untouched in the District Court. Neither the omission nor the lack of adequate support was explored.

An unmistakable issue of law was raised with respect to section 10 of the Clayton Act. Refuge in expertise judgment was unavailable. To avoid reversing the Commission, the Court supplied its own concept of what the law ought to be, a concept so alien to the Congressional enactment that it was never urged or defended—either before or after the District Court opinion.

Finally, there were the broader antitrust aspects of the case. Seldom is a purpose to inhibit competition candidly announced. This case being an exception, one would have expected the Court to seize upon the confession of illegal purpose and question the failure of the administrative agency to take it into account. If the Court gave any thought to the adverse effect upon competition between the several

gateways, it was not expressed in the written word of the opinion. The judicial thinking was that since the general subject had been given some limited consideration by the Commission, Minneapolis was foreclosed from asking the Court to examine any phase of the issue. (R. 101)

Not without significance is the fact that this very District Court gave the same rubber stamp approval, almost at the same time, to a decision of the Commission denying competitive carriers—including large connections—authority to acquire a smaller carrier because of the harmful results competitively. *Canadian Pacific Ry. v. United States*. 158 F. Supp. 248 (D. Minn. 1958).

The perfunctory character of the review, manifest in the lower court's opinion, constituted an abdication of the functions designed to assure compliance with law by an administrative agency.

### CONCLUSION

The considerations presented in this brief warrant relief by an order or orders:

1. Enjoining, annulling and setting aside the orders of the Interstate Commerce Commission dated May 31, 1957 and October 30, 1957 in Dockets 18991 and 18906.
2. Declaring that, on the undisputed evidence, the Interstate Commerce Commission should have made an order determining that the application of Minneapolis to acquire the capital stock of Western is in the public interest, serving to promote the National Transportation Policy because of efficiency, economy and improved service, the absence of unfair or destructive competitive practices, and the strengthening of Minneapolis as an integral part of the national transportation system.

3. Declaring that the Interstate Commerce Commission should have found that the application of Santa Fe and Pennsylvania to acquire the stock of Western is contrary to the public interest by reason of their conflicting interests in competing gateways, the absence of any improvement in service or provision for economies, Pennsylvania's violation of section 10 of the Clayton Act, and the fact that the acquisition would produce flagrant violations of section 1 of the Sherman Act and section 7 of the Clayton Act, which are neither balanced nor overridden by any considerations of public interest.

4. Declaring that upon this record and as a matter of law it is the duty of the Interstate Commerce Commission to enter an order approving the application of Minneapolis, authorizing the acquisition of the Western stock by Minneapolis and denying the application of Pennsylvania-Santa Fe.

5. Reversing the order of the District Court and remanding this proceeding to that Court with directions to take appropriate steps to effectuate the foregoing relief.

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**APPENDIX A**

*Section 1 of the Sherman Act, as amended (26 Stat. 209, as amended, 15 U.S.C. § 1):*

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction there-

of, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

*Section 7 of the Clayton Act, as amended (38 Stat. 731; as amended, 15 U.S.C. § 18):*

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate

branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Com-



merce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

*Section 10 of the Clayton Act (38 Stat. 734, 15 U.S.C. 20):*

"No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

"Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition

among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

"Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

"If any common carrier shall violate this section, it shall be fined, not exceeding \$25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000 or confined in jail not exceeding one year, or both, in the discretion of the court."

*National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding § 1):*

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster

sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

*Section 5(2) of the Interstate Commerce Act, as amended*  
(24 Stat. 380, as amended, 49 U.S.C. § 5(2))

“(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

“(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person

which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

“(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by, any other such carrier, and terminals incidental thereto.

“(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties, of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and, a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled

by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under

this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

*Section 5(11) of the Interstate Commerce Act, as amended (24 Stat. 380, as amended, 49 U.S.C. § 5 (11)):*

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with

the assent, in the case of a purchase and sale, a lease, corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority, and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."



*Section 8 (b) of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. § 1007(b)):*

"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

\* \* \* \* \*

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

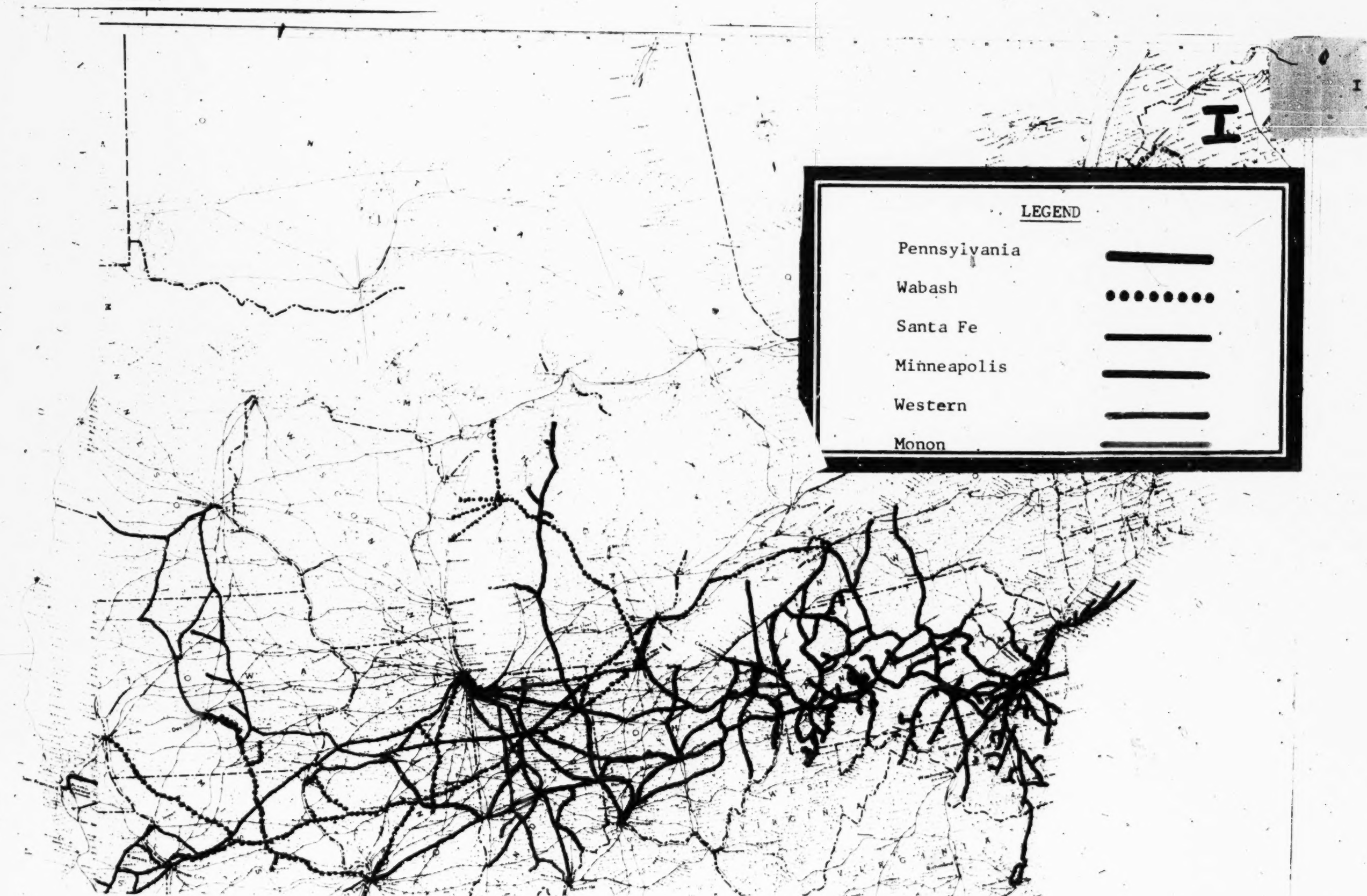
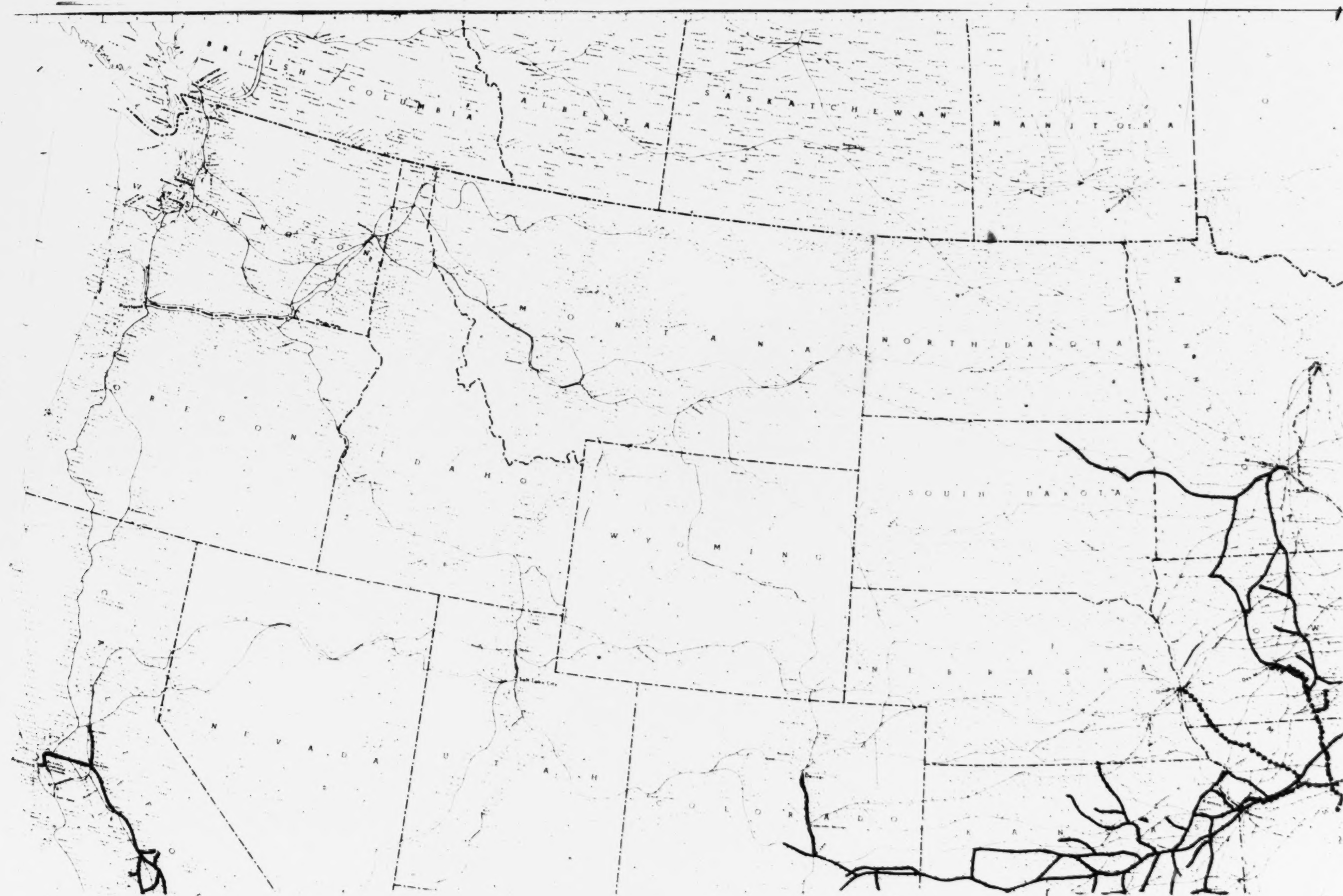
*Section 10 (e) of the Administrative Procedure Act (6 Stat. 243, 5 U.S.C. § 1009 (e)):*

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion,

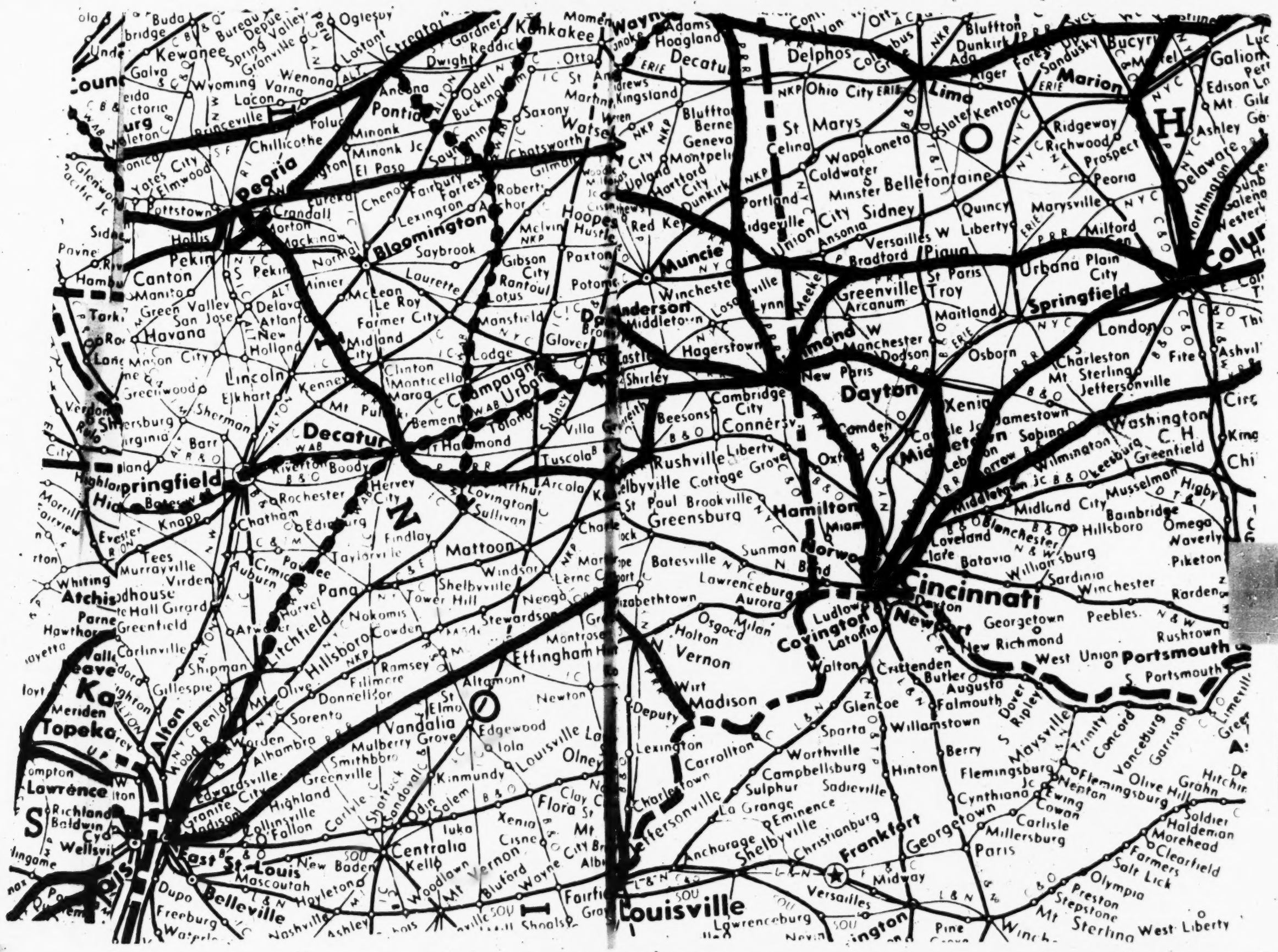
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"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provi-

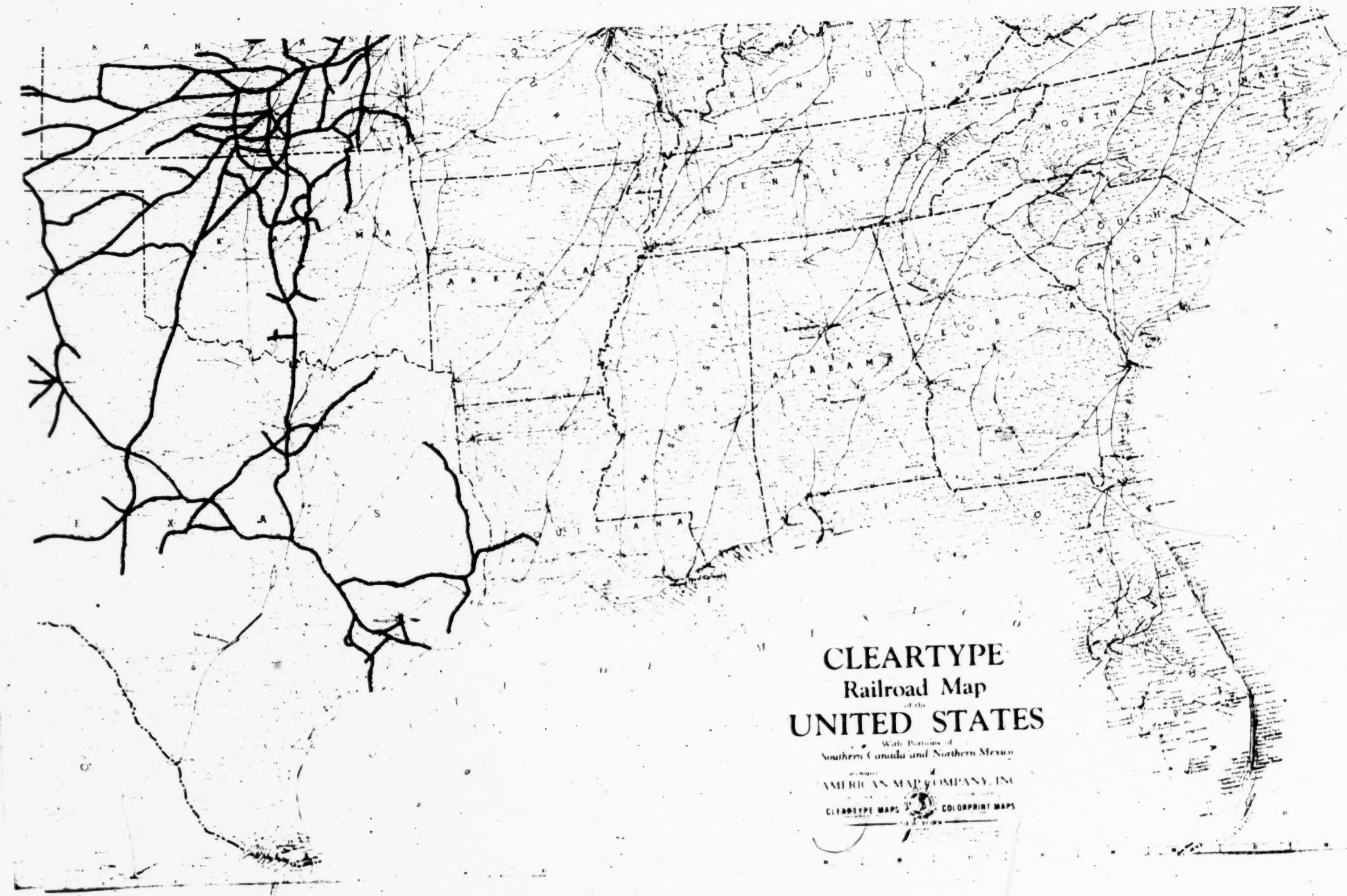
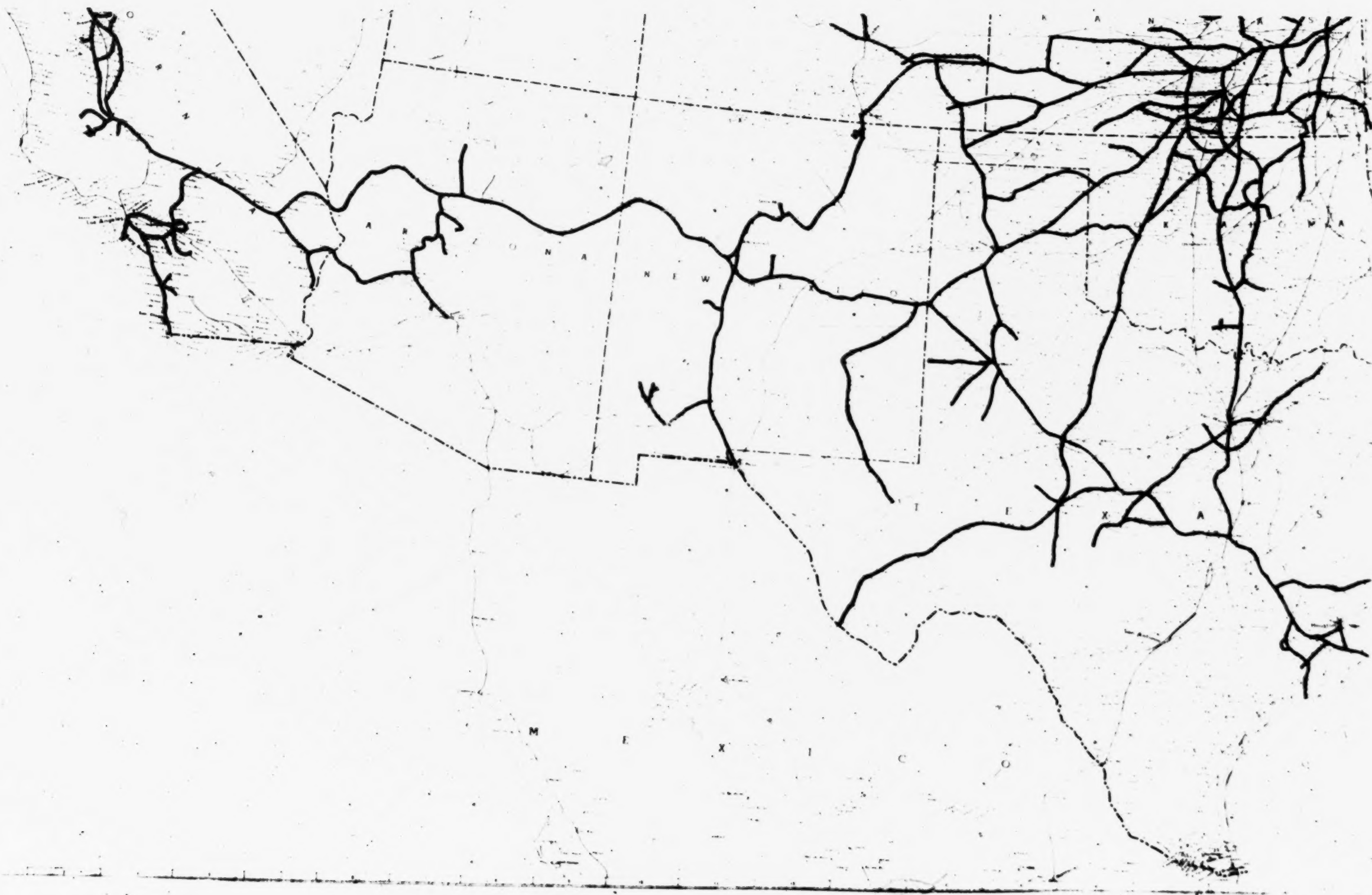
sions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."











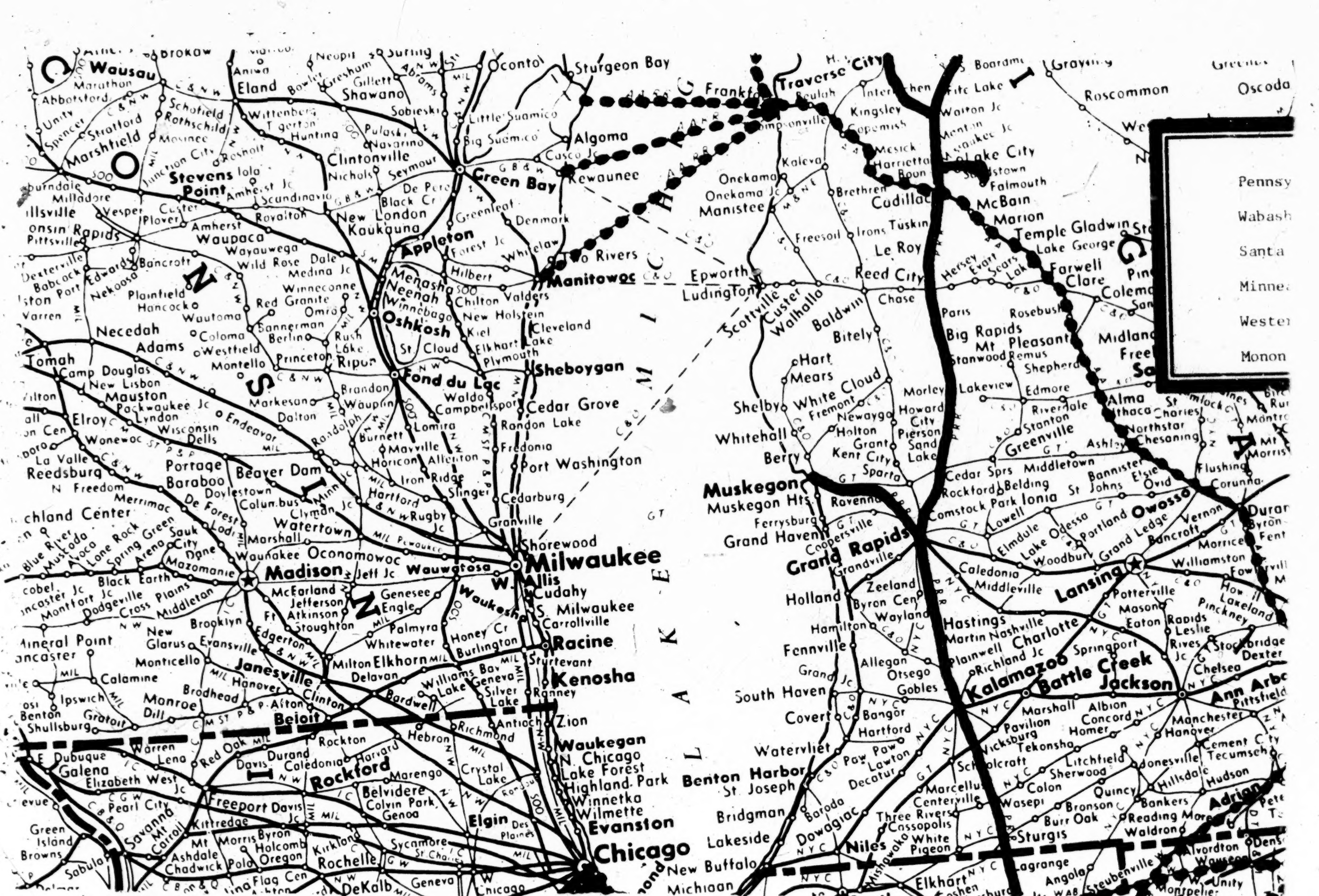
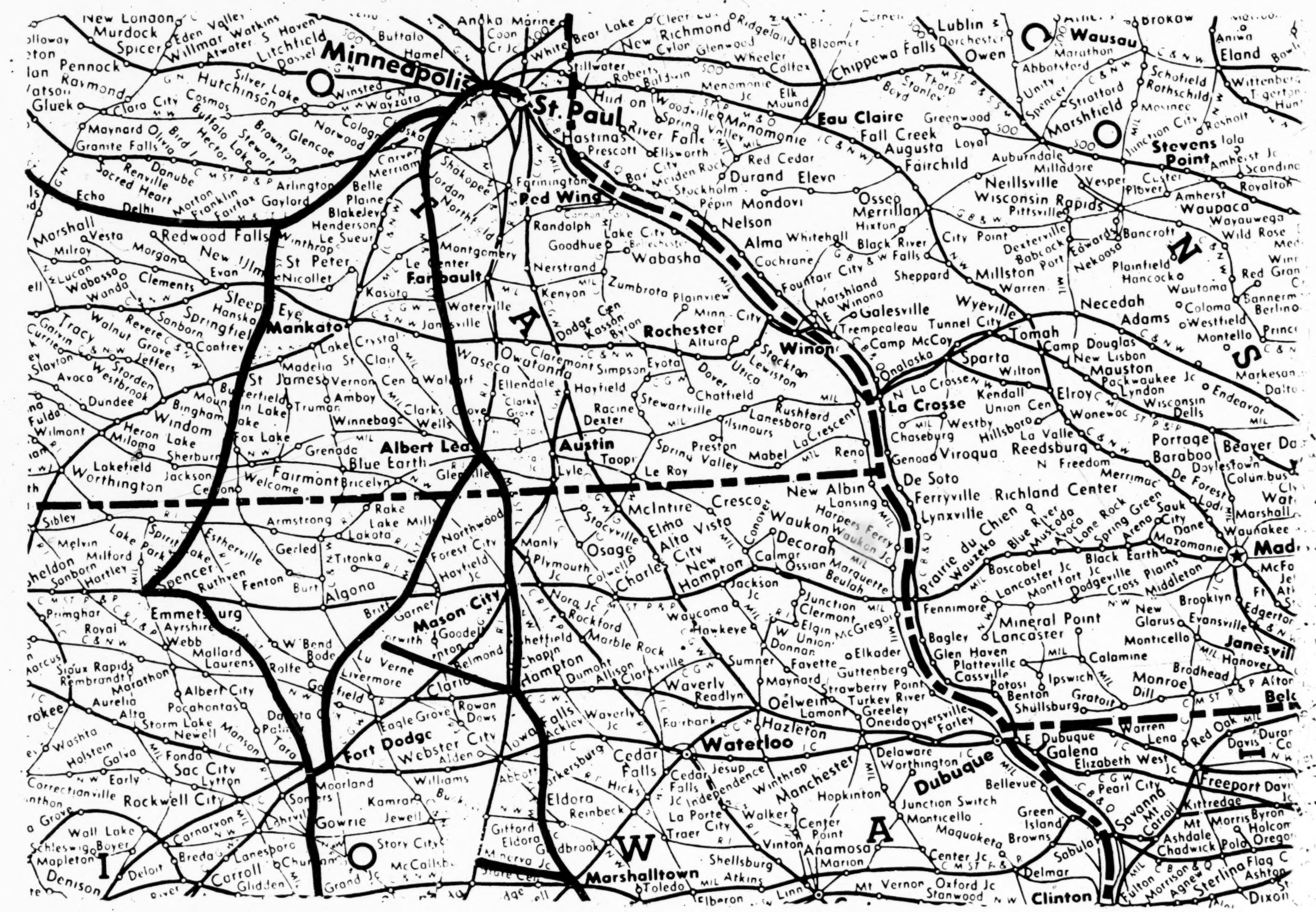
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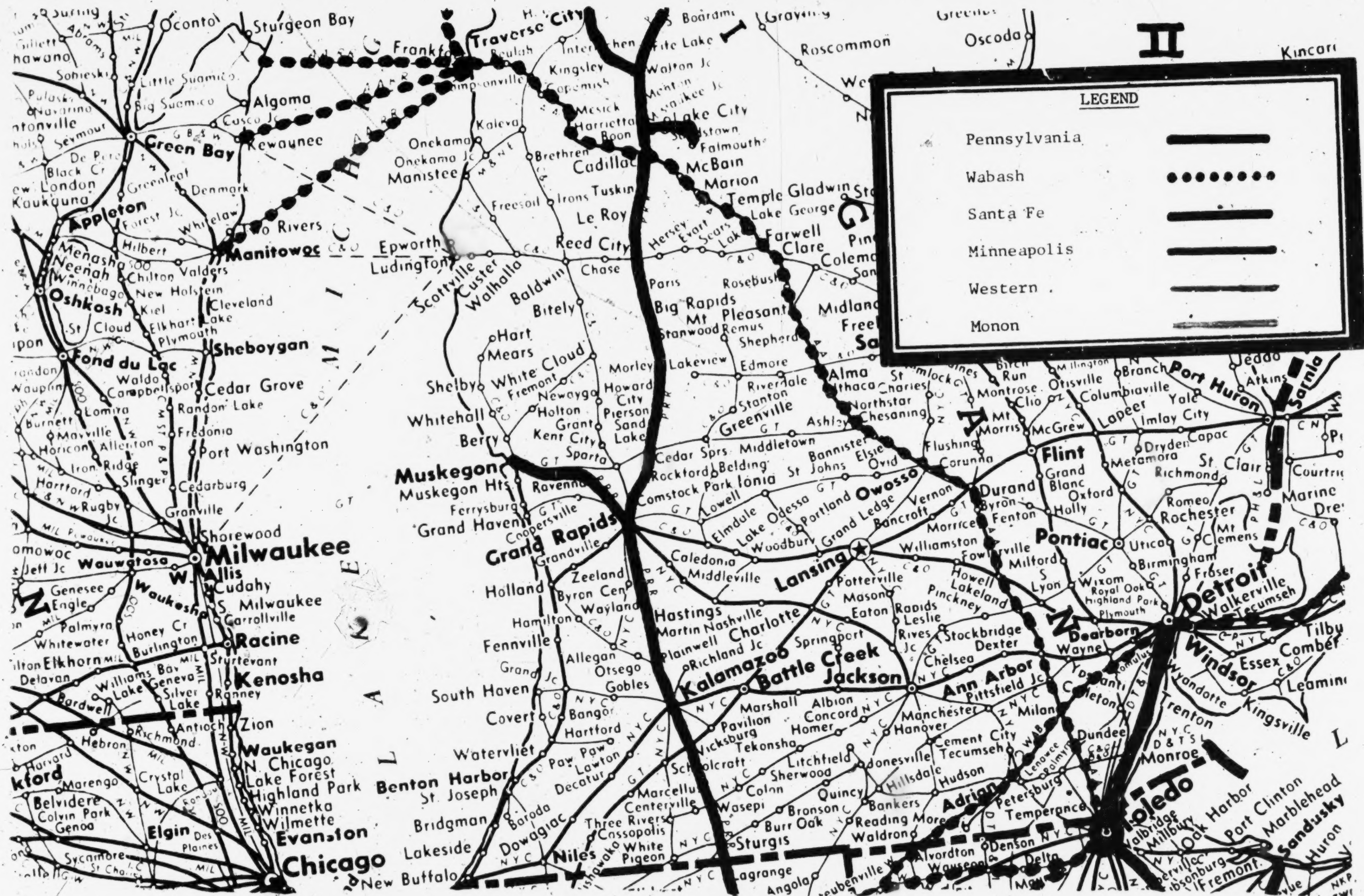
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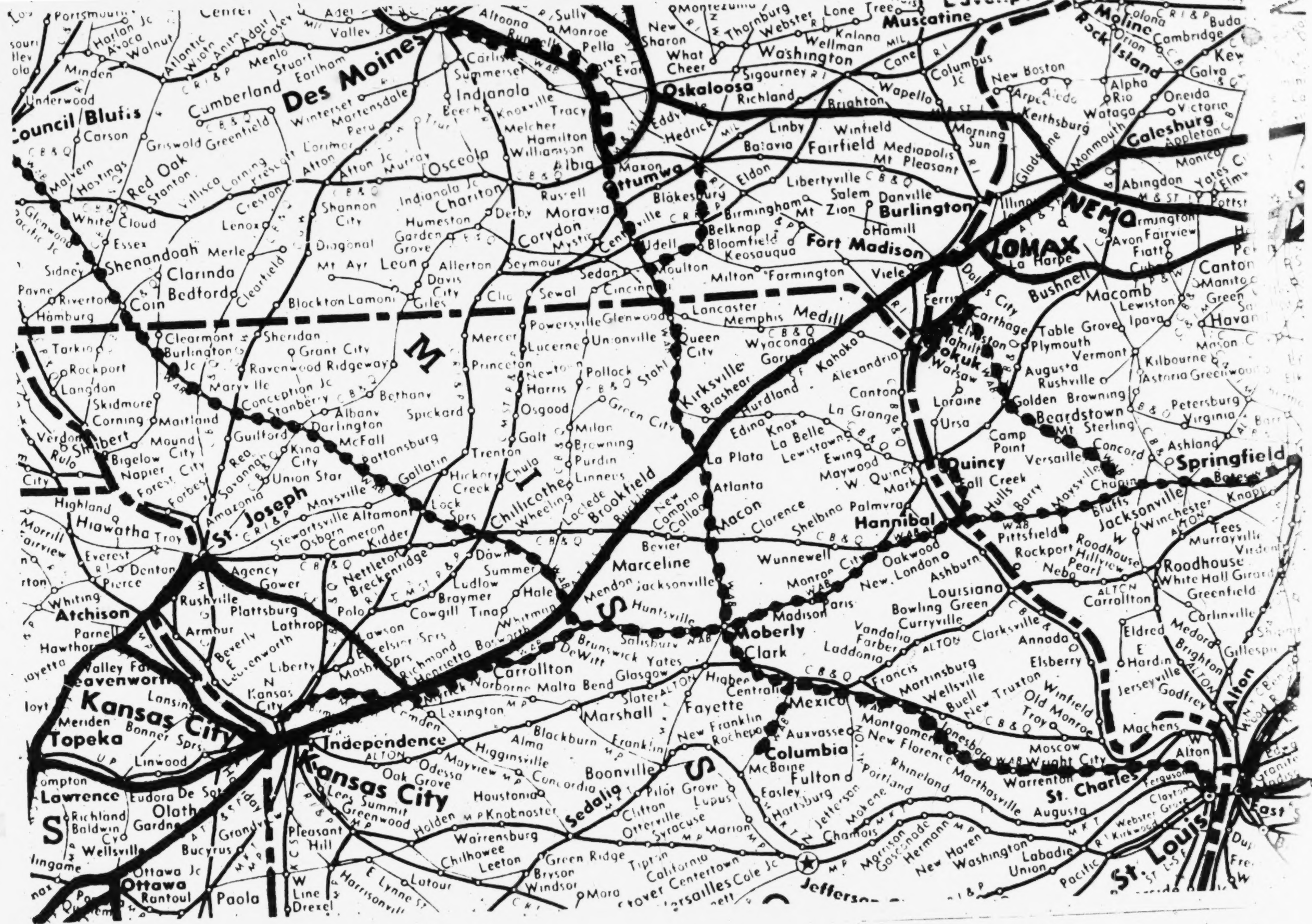




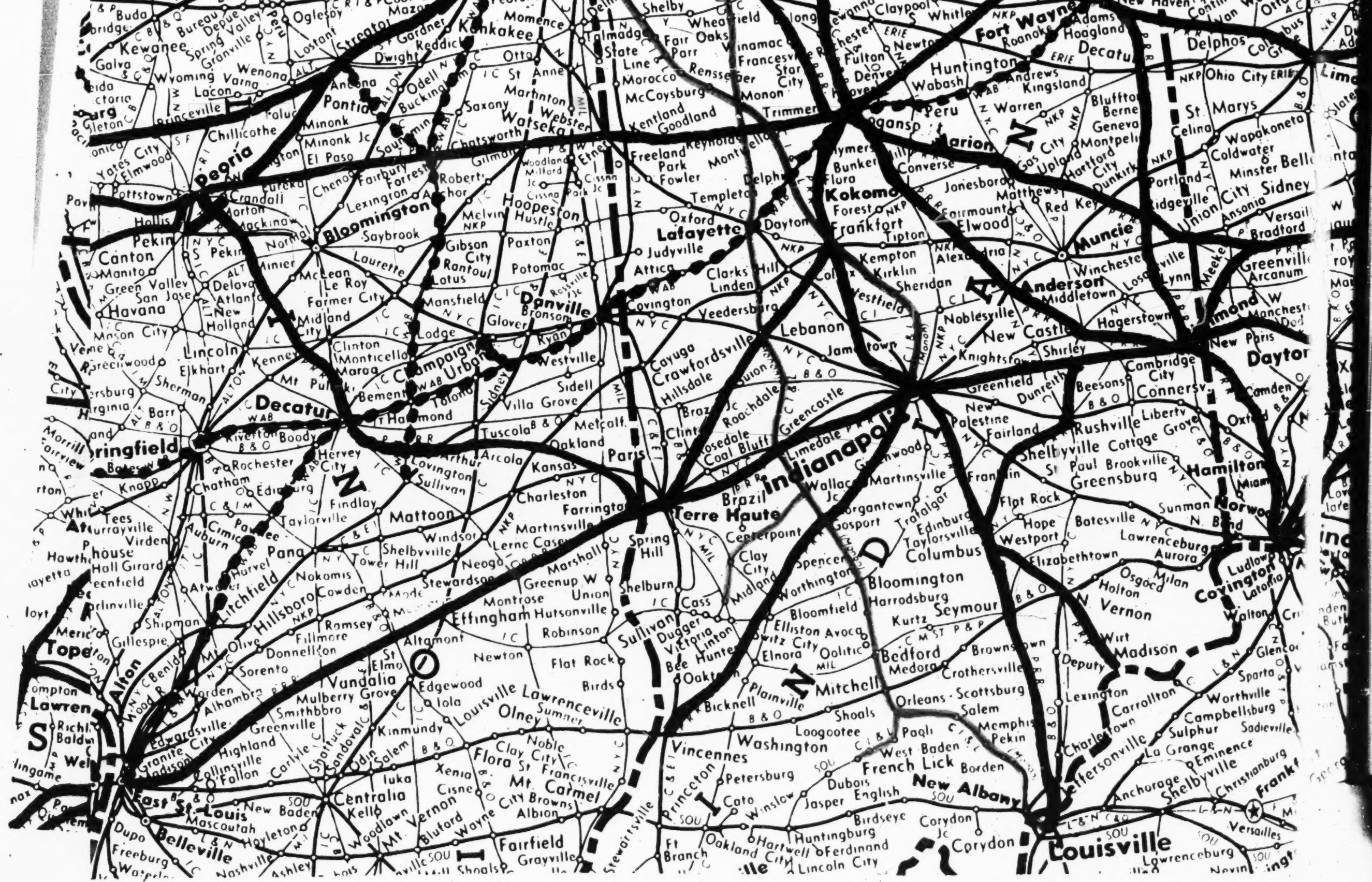












BY THE APPLICANTS

IN STATE OF SOUTH

DAROTA AND PUBLIC

UTILITIES COMMISSION OF

IN STATE OF SOUTH

DAROTA

**In the**  
**Supreme Court of the United States**  
**OCTOBER TERM 1959**

**No. 27**

**THE STATE OF SOUTH DAKOTA AND THE PUBLIC UTILITIES  
COMMISSION OF THE STATE OF SOUTH DAKOTA**

*Appellants*

**vs.**

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.**

*Appellees*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

**BRIEF OF APPELLANTS**  
**THE STATE OF SOUTH DAKOTA AND**  
**THE PUBLIC UTILITIES COMMISSION OF**  
**THE STATE OF SOUTH DAKOTA**

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---

**OPINIONS BELOW**

The opinion of the District Court for the District of Minnesota, 4th Division, is reported in 165 F. Supp. 893. The report of Division 4 of the Interstate Commerce Commission is reported in 295 I.C.C. 523. Copies of these opinions are printed in the consolidated record herein (R. 91-105, 17-49), covering this appeal and the companion appeals of The Minneapolis & St. Louis Railway Company



(No. 12) and of the State of Minnesota and the Minnesota Railroad and Warehouse Commission (No. 28).

### **JURISDICTION**

This appeal is taken from the final order of the United States District Court for the District of Minnesota, entered September 16, 1958, dismissing several complaints, including the complaint in intervention of these appellants, and refusing to vacate the order of Division 4 of the Interstate Commerce Commission issued May 31, 1957, and the Order of the Interstate Commerce Commission of October 30, 1957. The Commission's Orders authorized The Atchison, Topeka and Santa Fe Railway Company and the Pennsylvania Railroad Company to acquire control, through stock ownership, of the Toledo, Peoria & Western Railroad Company, and dismissed the competing application for acquisition by The Minneapolis & St. Louis Railway Company.<sup>1</sup>

The State of South Dakota and the Public Utilities Commission of the State of South Dakota were intervenors before the District Court. The action was brought by Minneapolis to set aside the above mentioned orders of Division 4 of the Interstate Commerce Commission and of the Interstate Commerce Commission. It was heard by a District Court of three judges, as provided in 28 U.S.C. § 2284 and §§ 2321-2325. The final order of the District Court was entered September 16, 1958, and the appellants' Notice of Appeal was filed in that Court November 13, 1958 (R. 105, 114). The jurisdiction of the Supreme Court to

<sup>1</sup> Hereafter, as in the proceedings below, The Minneapolis & St. Louis Railway Company will be referred to as "Minneapolis", the Toledo, Peoria & Western Railroad Company as "Western", The Atchison, Topeka and Santa Fe Railway Company as "Santa Fe", and the Pennsylvania Railroad Company as "Pennsylvania".

review that decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

### **STATUTES INVOLVED**

Section 1 of the Sherman Act, as amended (15 U.S.C. § 1); section 7 of the Clayton Act, as amended (15 U.S.C. § 18); the National Transportation Policy and sections 5(2) and 5(11) of the Interstate Commerce Act, as amended (49 U.S.C. preceding § 1, and §§ 5(2) and 5(11)); and sections 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. §§ 1007 and 1009) are set forth in Appendix A of the Minneapolis brief and are incorporated herein by reference.

### **QUESTIONS PRESENTED FOR REVIEW**

These appellants will present two questions which are of immediate and urgent concern to the State of South Dakota.

1. The Interstate Commerce Commission arbitrarily and erroneously failed to consider or to make any findings concerning the harm to the public which will result from loss of adequate rail transportation service on the branch lines of the Minneapolis in South Dakota. The findings refer to no off-setting or overbalancing benefits to the area served by the Santa Fe and the Pennsylvania which could result from their acquisition of Western. The public interest resulting from predicted abandonment of service is so directly related to the statutory criterion "*adequacy of transportation*" that absence of findings by the Commission on this controlling issue renders its decision void, and requires setting aside the Commission's Order.

2. In authorizing the Pennsylvania-Santa Fe acquisition, the Interstate Commerce Commission failed to give proper weight and consideration to the adverse competitive effect thereof on Minneapolis and to the antitrust policy and purposes of section 1 of the Sherman Act and section 7 of the Clayton Act.

### STATEMENT OF THE CASE

As indicated above, the appeal to this Court of the State of South Dakota and the Public Utilities Commission of the State of South Dakota is a companion appeal to that taken by Minneapolis from the same final Order of the District Court. Therefore, we shall confine this brief to those facts and issues which directly affect the *public interest* of this State, and adopt by reference in the interest of brevity the Statement of the Case set forth in the brief of Minneapolis, mentioning here only those additional facts of special interest to this State.

The State of South Dakota and the Public Utilities Commission of the State of South Dakota have participated throughout, both before the Interstate Commerce Commission and in the District Court. These appellants have done so in order to protect the *public interest* of South Dakota in adequate rail transportation and to assure the integrity of the marginal branch lines of Minneapolis serving South Dakota and the several railroad stations located along such lines. Absence of competitive rail lines serving much of the area renders imperative continuance of the established rail service by Minneapolis.

The Minneapolis branch line entering South Dakota extends approximately 154 miles into the northeastern part of the state (R. 1166). It is an important link of rail transportation in the state, serving six counties and seventeen

cities and towns and the trade territory adjacent thereto (R. 1167). This area in South Dakota consists of 6,685 square miles of farm land, all under cultivation, with an annual average production of over \$92,000,000 of agricultural commodities (R. 1168-1169; Ex. H-37, R. 1856-1866, 1173). Over a period of 27 years, an average of 136,581 tons of traffic originated on the South Dakota segment of the Minneapolis and 92,363 tons of freight terminated thereon (Ex. H-37, R. 1856-1866, 1173). That segment of rail transportation is a part of the less remunerative mileage operated by Minneapolis (R. 1170). Continuance of rail service on this segment is dependent upon the results of operations over the system as a whole (R. 1117, 1432).

Witness Swanson testified (R. 1117):

"We have analyzed this traffic and have come to the conclusion that based upon 1954 figures we would suffer an annual loss of approximately \$1,110,000 in the event the application of the Pennsylvania and Santa Fe were granted.

"All of this business I have described as being vulnerable to loss to the M&StL, is very desirable traffic. It not only pays its way but lends substantial support to our entire system. *Without it our low density lines in South Dakota, Western Minnesota, and Western Iowa could not survive.*" (Emphasis supplied)

The factual accounting basis for Mr. Swanson's estimate was in evidence and was not challenged (Ex. H-32, R. 1755-1767, 1166; Ex. H-33, R. 1768, 1166). His testimony was corroborated by that of other witnesses, including Dr. Edmund A. Nightingale, of the University of Minnesota, an independent, unquestioned authority on transportation and railroad traffic (R. 1431-1441). None of

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the testimony was controverted. The Commission refused to consider it.

The Interstate Commerce Commission had only this to say:

*"State representations—*The States of Minnesota and South Dakota, along with their respective Public Service Commissions, intervened in support of the Minneapolis application. They fear that with Western under the control of the Santa Fe and the Pennsylvania, the Peoria route of the Minneapolis will deteriorate to the extent that its low density lines in Minnesota and South Dakota will be in danger of abandonment \* \* \*. Of course, there can be no abandonment of any line of railroad without the issuance by us of a certificate of public convenience and necessity permitting such abandonments. So far as the instant record is concerned, no abandonments are presently contemplated." (R. 42-43)

The District Court did even less. It did not even refer to the contentions of these appellants except to state that they supported the Minneapolis.

The Interstate Commerce Commission ignored the factors which are of primary importance to the State of South Dakota and which should be controlling. The District Court, in turn, simply by-passed the Commission's error of omission and commission thereby depriving these appellants of a full judicial review.

### SUMMARY OF ARGUMENT

When it approved the Pennsylvania-Santa Fe application and dismissed the Minneapolis application, the Interstate Commerce Commission failed to strike a balance between the public benefits, on the one hand, and the loss or damage to the public, on the other hand. The Commission



ignored the sole dependence of Minneapolis on the Peoria gateway and brushed off the uncontroverted evidence of the serious consequences to this State which would flow from having Western pass into the hands of competitors lacking any comparable interest in the Peoria gateway. In the few instances, where it did consider results, the Commission employed different standards to test the competing applications. Otherwise, it completely failed to make findings on the material issues. The Commission's action ignored the standards of the National Transportation Policy and the Interstate Commerce Act and the procedural requirements of the Administrative Procedure Act. In essence, the award constituted arbitrary action which should be reversed.

In authorizing the Pennsylvania-Santa Fe combine to take control of Western, the Interstate Commerce Commission did not even mention section 1 of the Sherman Act, section 7 of the Clayton Act, or the national antitrust policy. The Commission purported to give the successful applicants immunity from prosecution under those antitrust laws without any findings on the issues presented by the record and without stating any reasons why such immunity could be warranted in the public interest. If that determination stands, it will be contrary to the teaching of *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), and will amount to a holding that the antitrust laws are completely inapplicable to the conduct of the nation's transportation.

## ARGUMENT

### 1. The Disregard of the Branch Lines in South Dakota.

The National Transportation Policy (49 U.S.C. preceding § 1) requires the Interstate Commerce Commission "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation". Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) commands the Commission to approve applications for control of a carrier only when the proposed transaction "will be consistent with the public interest", and orders the Commission to give weight to the effect of the proposed transaction upon adequate transportation service to the public. The meaning of the basic statutory criterion has been expressed as follows by Chief Justice Hughes in *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25 (1932):

" \* \* \* the term 'public interest' \* \* \* is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. \* \* \*"

In the instant case the evidence before the Commission established beyond question that the Minneapolis is solely dependent upon the Peoria gateway for its lifeblood (R. 1100-1102, 1413), whereas the Pennsylvania-Santa Fe combine has no comparable interest in the Peoria gateway (R. 497, 498-499, 506, 520-522, 546-547, 571, 590-591, 1126-1129); that ownership of Western by the Minneapolis would foster economy and efficiency (R. 1028, 1076-1077, 1186-1187, 1228-1229, 1239-1242; Ex. H-44, R. 1894-1924, 1379), whereas ownership by the Pennsylvan-

ia-Santa Fe combine would promote neither economy nor efficiency (R. 434-435, 437-439); that ownership by the Minneapolis would promote adequate transportation service (R. 1101-1104, 1184-1185, 1229-1231, 1231-1234), whereas ownership by the Pennsylvania-Santa Fe combine would do nothing toward that end (R. 457-458, 520-522, 571). The State of South Dakota and its Public Utilities Commission have a vital interest in strengthening the Minneapolis to preserve the adequacy of its transportation service on the branch lines in this State; they have an equally vital interest in seeing that the Minneapolis is not weakened, because the inevitable result of any such weakening will be felt first on the marginal branch lines in South Dakota (R. 1117, 1166-1167, 1168-1170, 1431-1441).

The record is replete with uncontroverted evidence of the vulnerability of the traffic presently carried by Minneapolis (R. 1112-1117, 1185, 1408-1409). Much of that highly competitive traffic is certain to be diverted by the powerful solicitation efforts of the Pennsylvania-Santa Fe combine (R. 1117, 1187-1188, 1408-1409). The Commission recognized that there might be some diversion of traffic, but concluded, "\* \* \* such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers" (R. 34). That conclusion is empty, unexplained, unsupported and erroneous.

As indicated above, the Commission also brushed off the contentions of these appellants by stating that "no abandonments are presently contemplated" (R. 43). It is clear, however, that one of the first effects of drying up the Minneapolis traffic will be an application, at some future date, for abandonment of service on the marginal branch lines in South Dakota (R. 1117, 1169-1170, 1437). These

appellants are interested in preventive medicine now, not curative medicine in the future. A diminution of the Minneapolis revenues must be prevented now so that no reason can be given in the future for abandonment of the trackage in South Dakota. If the revenues are allowed to diminish and in consequence the branch lines in South Dakota become losing operations, then they will be a burden on interstate commerce and it will be the duty of the Commission to authorize the abandonment of those lines. That inevitable result was totally disregarded by the Commission in the instant case. The realistic danger faced by South Dakota stems from the inescapable economies; it is not limited, as the Commission lightly assumed, by "present contemplations".

The Commission's shocking prejudgment of this case is laid bare by the double standard it employed. The effect of the Pennsylvania-Santa Fe acquisition of Western was simply brushed aside and the future abandonments it would necessitate were deemed unimportant (R. 42-43). On the other hand, when considering the effect of an acquisition of Western by the Minneapolis, the Commission stated (R. 32):

"Under the Minneapolis' unified-operation theory a new service route via Forrest would be established for such traffic which would imperil, or at least diminish the Wabash's participation therein, and possibly could result in the abandonment of the latter's Des Moines branch."

The record contains no support for the Commission's solicitude on behalf of the Wabash: nor any explanation of the different treatment concerning abandonment between the competing applications. The unexplained contrast in the treatment makes a travesty of administrative justice.

A number of communities along the Western supported the Pennsylvania-Santa Fe application. Their intervention, however, was merely a result of a brief, intensive public relations campaign by the wealthy Santa Fe (*e.g.*, R. 637-638, 643-645, 673-674, 748-750, 751-752, 800-801, 821-822, 884, 1505-1506). In truth those communities would benefit from a Minneapolis acquisition and could suffer from a Pennsylvania-Santa Fe acquisition. Certain labor groups also supported the Pennsylvania-Santa Fe application. They also could not suffer from a Minneapolis acquisition; they are protected by the Minneapolis commitment to abide by the provisions of the Washington Job Protection Agreement of 1936 (R. 1032-1033). Furthermore, the record is clear that any labor economies to be effected by Minneapolis would come as the result of normal retirements, not discharges (R. 1032, 1033, 1078, 1242).

In reaching its arbitrary conclusion to approve the further aggrandizement of the two railroad giants and to overlook the harmful effects on these appellants and others, the Commission not only ignored the controlling statutory criteria but also violated the procedural requirements essential to due process. In reaching this conclusion, it did not, because it could not, make the findings required by section 8 of the Administrative Procedure Act (5 U.S.C. § 1007). Absent such findings, there was no basis on which the District Court could perform its duty of judicial review. These appellants were denied fair treatment by the Commission. They were then deprived of judicial review by the District Court.

The finding that an acquisition of one railroad by another is "consistent with the public interest" must show that full consideration has been given to the *public* benefits on the one hand versus the loss or damage to the *public*

on the other hand. There must be the striking of a balance between the public benefits, if any, and the public loss clearly articulated and spelled out so as to make clear the effectuation of the prescribed Congressional standards and criteria *"to promote safe, adequate, economical and efficient service and foster sound economic conditions in [railroad] transportation."* In this the Commission failed.

The Commission's failure in this respect was not because its duty was not called to its attention. Professor William Leonard, Chairman of the Department of Economics, Hofstra College, summarized it in the following language (R. 1414):

"The Commission is fortunate in this proceeding to have an affirmative choice between two applications, that of the Santa Fe and Pennsylvania, and that of the M&StL. Ordinarily, the Commission does not have the alternative of deciding whether a road should be acquired by one carrier or another in a case, comparing the benefits flowing from one proposal with those flowing from another, but only whether in a single application for control, the advantages outweigh the disadvantages. In this combined proceeding the Commission's choice is wider. Here, I believe, we have convincing proof that the gains to the Pennsylvania and Santa Fe and their shippers are minimal in comparison with the injury which could easily befall the M&StL, its shippers, and the area it serves.

"As for possible injury to the Santa Fe and Pennsylvania from the proposed control by the M&StL of the TP&W, this would be negligible. Such control would be as injurious to these great systems as a gnat's bite would be to an elephant.

"In the light of these considerations, I believe the application for control of the TP&W by the M&StL eminently meets the tests of public interest, and requires approval by the Commission."



As to what constitutes arbitrary action, in the case of *Baltimore, & Ohio R.R. v. United States*, 264 U.S. 258, 265 (1924), it was stated:

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

## 2. The Antitrust Effect.

The Interstate Commerce Commission and the District Court sanctioned and approved what is in effect a gigantic railroad merger. The acquisition of Western gives the Pennsylvania-Santa Fe combine a third major gateway and unifies their operations from Tidewater on the east to Tidewater on the west.

In *McLean Trucking Co. v. United States*, 321 U.S. 67, 86 (1944), this Court announced:

"Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy."

Admittedly, section 5(11) of the Interstate Commerce Act (49 U.S.C. § 5(11)) empowers the Commission in an appropriate case to give immunity from prosecution under the antitrust laws. That immunity, if it is to be granted, must be based on an explicit judgment that it is required by other factors in the "public interest". The size of the merging carriers cannot be wholly ignored as it was in the instant case. The powerful rail combine authorized by the Commission in this case dwarfs, by comparison, the few motor lines whose merger was authorized in the *McLean* case.

In this case the appellees have attempted to defend the Commission's action by asserting that conditions were included for the protection of other carriers. It is true that the Commission has power by statute to condition approval of any acquisition on "such terms and conditions" as it shall find to be just and reasonable (49 U.S.C. § 5(2)). But that limited power is here exceeded. The Commission has used unenforceable conditions to justify and immunize what would otherwise be a clear violation of the antitrust laws—the laws which this Court has said the Commission may not ignore. If allowed to succeed in this case, it can succeed in any case, and the Commission can always use the imposition of "terms and conditions" to justify its total disregard of all controlling statutory standards. We doubt that the power conferred by Congress on the Commission was ever intended to be so far-reaching as to permit the results which have occurred in this case.

The Pennsylvania-Santa Fe combine is a gigantic one, by any test. Its latent power is an enormous threat to any smaller competitors and to intervenors, like these appellants, who are dependent upon such small competitors. The monopoly or oligopoly sanctioned in this case has no precedent. There are no findings and there is no articulation of any reasons which could justify the creation of this colossus. If this Court affirms the result announced below, it will be holding, in essence, that the antitrust laws are wholly inapplicable to the transportation industry.

### CONCLUSION

The Interstate Commerce Commission failed to perform its statutory duty. Its arbitrary conclusions have neither a rational basis nor supporting findings. It is respectfully sub-

mitted that the judgment of the District Court should be reversed and that that Court should be instructed to grant the relief sought by the complaints of the plaintiffs below.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1959

No. 28

THE STATE OF MINNESOTA and the MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

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*Appellees,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

## BRIEF OF APPELLANTS

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IN THE  
**Supreme Court of the United States**

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October Term, 1959

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No. 28

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THE STATE OF MINNESOTA and the MINNESOTA  
RAILROAD AND WAREHOUSE COMMISSION,

*Appellants,*

vs.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, et al.,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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**BRIEF OF APPELLANTS**

The State of Minnesota and the Minnesota  
Railroad and Warehouse Commission

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**OPINIONS BELOW**

The opinion of the District Court for the District of Minnesota, 4th Division (R. 91-105), is reported at 165 F. Supp.

893. The report of Division 4 of the Interstate Commerce Commission (R. 17-49) is reported at 295 I.C.C. 523.

## JURISDICTION

The jurisdiction of this Court to review the decision of the district court by direct appeal is conferred by 28 U.S.C., Sections 1253 and 2101(b). The final order of the district court was entered September 16, 1958 (R. 105), and the notice of appeal of the State of Minnesota and the Minnesota Railroad and Warehouse Commission was filed in that court on November 12, 1958 (R. 111). On March 9, 1959, this court entered an order noting probable jurisdiction and transferring this case together with the companion appeals of the Minneapolis and St. Louis Railway Company and the State of South Dakota to the summary calendar.

## STATUTES INVOLVED

The statutes involved in this proceeding are section 1 of the Sherman Act, as amended (15 U.S.C. § 1), sections 7 and 10 of the Clayton Act, as amended (15 U.S.C. §§ 18 and 20), and the National Transportation Policy and sections 5 (2) and 5 (11) of the Interstate Commerce Act, as amended (49 U.S.C. preceding § 1, and §§ 5 (2) and 5 (11) and sections 8 (b) and 10 (e) of the Administrative Procedure Act (5 U.S.C. §§ 1007 and 1009). The pertinent text of these statutes are set forth in Appendix A to the Minneapolis<sup>1</sup> Brief in its companion appeal at Docket No. 12.

<sup>1</sup>The interested railroads will be referred to hereinafter as follows:

Minneapolis and St. Louis Railway Company	Minneapolis
Toledo, Peoria & Western Railroad Company	Western
The Pennsylvania Railroad Company	Pennsylvania
The Atchison, Topeka & Santa Fe Railway Company	Santa Fe

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in failing to set aside the orders of the Interstate Commerce Commission on the grounds that the Commission failed to make adequate and proper findings and that the findings it did make were not supported by substantial evidence.
2. Whether the district court erred in failing to set aside the orders of the Interstate Commerce Commission on the grounds that the Commission's erroneous application and interpretation of the Interstate Commerce Act and the National Transportation Policy deprived the Minneapolis of a true comparative hearing thereby discriminating against its supporters including these appellants.
3. Whether the District court erred in failing to set aside the orders of the Interstate Commerce Commission on the grounds that the Commission erroneously interpreted and applied Section 5 (11) of the Interstate Commerce Act with respect to a violation of Section 10 of the Clayton Act occurring prior to the Commission proceedings.
4. Whether the district court erred in failing to set aside the orders of the Interstate Commerce Commission on the grounds that the Commission erroneously interpreted and applied Section 5 (11) of the Interstate Commerce Act with respect to Section 1 of the Sherman Act and Section 7 of the Clayton Act.
5. Whether the district court erred in failing to set aside the orders of the Interstate Commerce Commission because of the self-defeating scope of the review adopted by the district court.

## STATEMENT OF THE CASE

This proceeding involves the future control and development of the facilities of the Toledo, Peoria and Western Railroad Company and, to that substantial extent it involves the future control and development of the Peoria Gateway. Previously, the Western has been independently owned and operated. As a result of this proceeding the Western will be owned and controlled by the Pennsylvania-Santa Fe combination, the Minneapolis, or a combination<sup>2</sup> of these and other connecting carriers.

Because of the intimate association of the Minneapolis with the Western (R. 1010, 1014, 1111, 1112) and with the Peoria Gateway (R. 1011, 1101, 1440), the future development and stability of the Minneapolis is also involved in this proceeding. Many advantages would inure to the Minneapolis by approval of its application. These would include direct access to interchanges with the numerous lines connecting with the Western, longer hauls and greater ability to render better service (R. 1232, 1435). All of these would strengthen the Minneapolis in terms of competitive position and more efficient operation. Also resulting would be added stability from diversification of traffic to relieve present heavy reliance upon agricultural and mineral shipments (R. 1099, 1100, 1436). On the other hand, approval of the Pennsylvania-Santa Fe application would gravely injure the Minneapolis through the loss of traffic now handled by it between Peoria and Nemo. The extent of this loss has been estimated at approximately \$1,100,000.00 annually out of \$7,000,000.00 potentially vulnerable traffic revenue.

<sup>2</sup>The case for multiple ownership was summarily rejected by the Commission and that position is not represented in this application.

along that line (R. 1117, 1437). Diversion of this profitable traffic from the Minneapolis could very well affect its ability to provide service on the less profitable segments of its system in Minnesota and South Dakota (R. 1117, 1437).

Because of its duty to insure adequate transportation service within its boundaries the State of Minnesota also has a direct interest in the fate of the Minneapolis. The Minneapolis performs an important transportation role in the State and its main line connection with the Peoria Gateway adds to that importance its role in the National Transportation System. In those parts of the state where no other rail service is offered, its service is obviously indispensable. As the prime expositor of service through the Peoria Gateway, Minneapolis promotes for the State of Minnesota a second gateway to the Eastern Territory providing many additional connections to the South and to the East.

The Peoria Gateway, next to the Chicago Gateway, is the most important to the State of Minnesota (R. 1440). This importance stems from the necessity of connection with Official Territory railroads, with the Ohio River Gateways into the Southern Territory and connection through St. Louis, Missouri or Thebes or Cairo, Illinois into the Southwestern Territory (R. 1439). The Minneapolis line between the Twin Cities and the Peoria Gateway is the main line of that railroad (R. 1439). A further consideration of the importance of the Peoria Gateway to the State of Minnesota, involving the national defense as well, is the additional reliance upon that gateway which would be necessary during any period of national emergency (R. 1440).

These statements of Dr. Edmund M. Nightingale, the state's expert witness at the hearing, point up the position



of the State of Minnesota which was attempted to be communicated to the Commission;

"The State of Minnesota and the Minnesota Railroad and Warehouse Commission are vitally interested in the provision and continuance of adequate, economical and efficient transportation service for the people of that state. This objective is consistent with those of the National Transportation Policy, as stated in the Interstate Commerce Act. If the petition of the M&StL, the future interests of which are here at stake, is denied, the adverse effects upon the objectives stated above are likely to include curtailment or withdrawal of rail service from certain communities on light-traffic lines of the M&StL in western and southern Minnesota and South Dakota.

"Possibility of curtailment of service or abandonment on mileage of low-density lines of the M&StL is not something remote. In I.C.C. Finance Docket No. 15619, the M&StL sought authority and permission to abandon 40.66 miles of line between St. James, Minnesota, and Estherville, Iowa, some 36 miles of which is in Minnesota (see Ben W. Heineman's map in either Exhibit No. H-10 or H-21). A hearing was held at St. James, Minnesota in July 1947. By [fol. 1664] stipulation among the parties to that proceeding, passenger service was withdrawn and carload freight service was reduced to a tri-weekly basis. \* \* \* (R. 1432-1433)

"According to the Interstate Commerce Commission's Sixty-eighth Annual Report on Transport Statistics in the United States for the Year Ended December 31, 1943, total assets of the T. P. & W. are \$9,893,197, those of the Pennsylvania Railroad are \$2,455,547,988, and those of the Santa Fe are \$1,484,889,559, and those of the M. & St. L. are \$37,807,778. The T. P. & W. assets in relation to the combined assets of almost \$4,000,000,000 for the Pennsylvania-Santa Fe combination are hardly

visible at only 0.025 per cent of this huge total. Viewed in broad perspective, the effect therefore of adding the 1943 net income and assets of the T. P. & W. to those of the Pennsylvania-Santa Fe group is negligible, or about that of a peanut tossed by a child at a zoo to a hippopotamus.

"M. & St. L. freight revenue losses in the Peoria-Nemo traffic and that through Peoria to or from other gateways in [fol. 1671] the event the application of the Pennsylvania-Santa Fe combination were granted, have been estimated by Witness James A. Swanson at approximately \$1,110,000 in his Exhibit H-32, Schedule 1, and testimony. His estimate of potentially vulnerable traffic revenue is \$7,000,000. Highly desirable traffic like that between Peoria and Nemo not only pays its way but gives substantial support to the entire M. & St. L. system. It is highly doubtful that the grant of authority to acquire control of the T. P. & W. to the Pennsylvania-Santa Fe group which would further reduce the already thin cushion which enables the M. & St. L. to provide needed service on thin-traffic lines, is consistent with the National Transportation Policy and the requirements of Section 562 of the Interstate Commerce Act. \* \* \* (R. 1436-1437)

His analysis was confirmed on the record by Mr. Oliver Ossanna of the Railroad and Warehouse Commission (R. 1445). The State's position, while it rested upon unimpeached expert testimony, was brushed aside by the Commission and the district court with these comments by the Commission and the district court respectively:

"State representations — The States of Minnesota and South Dakota, along with their respective Public Service Commissions, intervened in support of the Minneapolis application. They fear that with Western under the control of the Santa Fe and the Pennsylvania, the Peoria

route of the Minneapolis will deteriorate to the extent that its low density lines in Minnesota and South Dakota will be in danger of abandonment. On the other hand, the State of Illinois opposes the application of the Minneapolis because of the possibility that the portion of Western's line west of Peoria may be abandoned, and the further reason that such control would have a devastating effect upon the economy of the city of Peoria and the State of Illinois generally. Of course, there can be no abandonment of any line of railroad without the issuance by us of a certificate of public convenience and necessity permitting such abandonment. So far as the instant record is concerned, no abandonments are presently contemplated." (R. 42-43)

"Minneapolis, supported by the Minnesota and South Dakota plaintiffs, contends, in effect, that, under the evidence [fol. 106] and the applicable law, the Commission could not approve the acquisition of the control of Western by the Pennsylvania and the Santa Fe, and should have approved the application of Minneapolis, which would have resulted in a consolidation with increased efficiency and economy in management. \* \* \* (R. 95)

The success of the Minneapolis like that of the Western has been in developing public acceptance of service through the Peoria Gateway rather than through the Chicago Gateway (R. 1010, 1413). The Minneapolis is the sole railroad serving Minnesota to the East whose gateway connections are only with the Peoria Gateway (R. 1408). The use and development of the Peoria Gateway is essential to the future development of both the Western and the Minneapolis. In direct contrast is the situation of both the Santa Fe and the Pennsylvania. The self-interest of the Pennsylvania lies primarily in the development of service through the St. Louis Gateway and the Chicago Gateway (R. 1406, 1435, 1440).

The self-interest of the Santa Fe lies in the development and use of the Chicago Gateway under Pennsylvania-Santa Fe control (R. 1406, 1435, 1440). This division of interest in the Peoria Gateway would prevent the Peoria Gateway from ever competing successfully with the St. Louis and Chicago Gateways which afford the longest hauls over Western's proposed owners. The control of the Peoria Gateway by the Pennsylvania and Santa Fe would result in greater control by them of the Chicago, Peoria and St. Louis Gateways. Any resulting loss in vitality of the Peoria Gateway would, because of the presence of the Great Lakes, force the state to rely entirely upon the Chicago Gateway for shipments to the East.

In addition to the foregoing statement particularly relating to the interests of the State of Minnesota, the state adopts by reference the Statement of the Case contained in the Minneapolis brief.

## SUMMARY OF ARGUMENT

These appellants contend that the Interstate Commerce Commission erroneously assumed that it must, or could, decide between the competing applicants on the basis of a single standard of public interest and further that the Interstate Commerce Commission erroneously considered that the Minneapolis did not have a transaction which could be considered by the Commission and that as a result of these fundamental errors, the Commission did not make findings as required by law or compare the advantages of the public interest of the competing applications as required by law and that the district court merely because it found substantial evidence in the record to support the conclusions of the Commission, failed to correct any of these errors.

## ARGUMENT

### 1. The Failure of the Commission to Make Proper Findings

The requirement of the Administrative Procedure Act for the findings to be made by administrative agencies, including the Interstate Commerce Commission, are set forth in Section 8(b) of the Act which provides as follows:

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. \* \* \*"

In comparative hearings the requirements for proper findings have been described in *Johnson Broadcasting Co. v. F. C. C.*, 175 F. 2d 351 (D.C. Cir. 1949), where it was stated:

"The principles which govern the interplay of administrative and judicial functions in a comparative consideration are basically the same as those which govern in the determination of the qualifications of a single applicant. The Commission has wide powers and discretion,

but upon appeal the courts must determine whether its action was within its statutory authority and applicable constitutional limitations, and the findings, conclusions and decision must be such that the courts can exercise the jurisdiction. But the essentials to legally valid conclusions differ, as the two problems, one of bare qualification and the other of comparative qualifications, differ. In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

The controversy involved herein is one of great importance not only to the participating parties but also to large segments of the public in the areas directly affected. Such a case demands sufficient attention of the Commission that it exercise care in preparing findings purporting to support the ultimate findings which it makes. The Commission is amply protected in its judgments on matters of discretion because of its presumed expertise. The decisions of the Commission should not be immunized by condoning such judgments to be buried in general recitals and discussions, without findings, so that they cannot be properly reviewed. Because of



the limited scope of review of Interstate Commerce Commission decisions, it is all the more necessary that the Commission's findings be clear cut and ready for immediate judicial inspection. It is apparent that the findings in this case do not measure up to the importance of the matter involved, nor to the complicated nature of the issues involved and do not resolve "all material issues of fact, law, or discretion" as required by Section 8(c) of the Administrative Procedure Act. The Commission's report amounts to little more than a summary of the proceedings. The report describes, with varying accuracy, the contentions of the several parties but in few instances are the contentions resolved by an appropriate and unequivocal finding of fact. Only the Commission's ultimate findings appear with "unambiguous clarity."

• • • A Commission having defined and limited delegated power must justify the exercise of that power by findings that support it and by evidence that supports the findings. When regard is had for the complicated technical nature of the problems and the voluminousness of the records in the important cases that come before the Commission, a fair discharge of its functions precludes casting upon a reviewing court the task of quarrying through a record to find for itself adequate evidence to permit the effectuation of orders of the Commission.

"The precise function of findings is to make practicable scrutiny by the courts in order to determine whether the Commission has kept within the bounds legislatively defined. To be sure, the Commission's findings are not binding in the sense that attack cannot be made on them for lack of evidence. *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88, 91-94, 33 S. Ct. 185, 186, 188, 57 L. Ed. 431. The Commission cannot — it has not purported to do so here — pass on to the Court an unanalyzed summary of a long proceeding and call it findings. While findings need not be formulated in an enumerated sequence, helpful as that would be, they must at least appear in a Commission's decision with unambiguous clarity, and they must be logically related to its conclusion. • • •

(Dissenting opinion. *Denver & Rio Grande West R. Co. v. Union Pac. R. Co.*, 351 U.S. 321 (1956).)

They are these:

"We find, subject to the conditions for the protection of railway employees and the maintenance of existing routes and channels of trade referred to herein, that acquisition by the Atchison, Topeka and Santa Fe Railway Company and the Pennsylvania Company, and through the latter by the Pennsylvania Railroad Co. of control of the Toledo, Peoria & Western Railroad Company through ownership of capital stock, in equal amounts, as described herein, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed are just and reasonable; and that the transaction will be consistent with the public interest..

"We further find that the application of the Minneapolis & St. Louis Railway Company for authority to acquire control of the Toledo, Peoria & Western Railroad Company, through ownership of capital stock, should be dismissed." (R. 49)

It is significant that these alone are the ultimate findings made by the Commission. No ultimate finding was made that the Minneapolis application was inconsistent with the public interest or that it should be denied. The ultimate finding that the Minneapolis application should be dismissed rests exclusively upon the fact that Minneapolis lacked a contract for the purchase of the controlling stock of the Western.

The finding that the Santa Fe-Pennsylvania application would be "consistent with the public interest" rests almost entirely on the finding that the public interest requires the Western to be continued as a "separate and independent" carrier. This latter finding, itself being in the nature of an ultimate finding, must be supported by subsidiary findings and substantial evidence. In fact, this standard must

have been an assumption rather than a conclusion for its factual or logical basis is nowhere developed by the Commission. The conclusive standard adopted is not one of the standards specifically mentioned in the Interstate Commerce Act or the National Transportation Policy nor is the standard justified in terms of those statutory standards, rather it is justified only on the basis of support for the standard by various interested parties. We submit that the finding of widespread support for the standard which automatically excludes the Minneapolis application does not alone justify its use. Considering the standard itself, neither the Minneapolis nor the State of Minnesota or the State of South Dakota advocated the disappearance of the Western as an independently owned and operated carrier. The decision of the trustees of the McNear estate to sell control of the Western alone advocates the disappearance of the Western as an independent railroad. The analysis of the Commission in relying upon the form of ownership and control of the Western is superficial. It appears, therefore, that the Commission not only adopted a standard which has no particular significance in the public interest as defined by the law, but also one which is not realistic and is not satisfied by any of the applicants.

## 2. The Failure of the Commission to Afford a True Comparative Hearing

### (a) *Erroneous adoption of a single standard of public interest*

Mere simultaneous consideration and disposition of the applications does not satisfy the requirements for a comparative hearing. The statement of the Commission at the

outset of its report that "we, in such proceeding as this *must* arrive at a *standard* of public interest" is patently erroneous. It was also fatally prejudicial since the single standard adopted, the continuance of the Western as a separate and independent operation, automatically excluded the Minneapolis proposal from any possibility of approval.

It is apparent that this statement of the Commission was literally applied and followed. As hereinbefore discussed the standard was adopted without proper findings to support it. There were many areas in which the competing proposals presented strong contrasts. The Commission should have established criteria or standards for these areas for the purpose of considering the extent to which each of the applications on a comparative basis would have fulfilled the standards so established. Thereupon proper findings of fact should have been made in relation to each of the criteria. In the absence of this kind of analysis and evaluation there is no sound basis for the Commission's final reliance upon one criterion as the conclusive basis for its determination. In, FCC Criteria for Evaluating Competing Applicants, 43 Minn. Law Review 479 (1959), by H. Gifford Irion, an analysis of the weight to be given any one criterion was made as follows:

"An analysis of the weight given to any one criterion, or an evaluation of all in the aggregate, is somewhat difficult because the language of decisions has not always been as explicit as might be desired. In some cases it would appear that each area of comparison has been treated as a distinct mathematical unit, and that the final result has been reached by tallying up points of preference. In its more reflective decisions, however, the Commission has expressly deplored this practice and has referred to the criteria as 'guideposts'. It should be clear to anyone seriously interested in judicial rea-

soning that an isolated area of preference, such as local ownership, is virtually meaningless unless it is considered in connection with a number of other factors. For example, the fact of residence must be tempered by the record of stockholders in civic participation and by the degree to which the owners will participate in management. Otherwise it would have no significance as an indication that knowledge of the community would result in better programming for its needs.

"At this point it is fitting to state emphatically that no application of the criteria can ever be successful when it loses sight of the basic philosophy which accounts for their existence. Using the phrase 'public service' as an approximate expression of this philosophy, it becomes evident that no one of the criteria should be determinative unless it tends to form a pattern with other evidence concerning an applicant's knowledge of the community, his ability and sincere efforts to perform promises and his general imagination and resourcefulness. The assessment which must thus be made of the areas of comparison is admittedly difficult. It should not be done in any mechanical fashion but requires a most conscientious use of judicial discretion. There can be no question that value judgments are called for. They are sometimes attacked as being 'subjective judgments,' and this is perhaps true if we regard a judgment that is not made by slide-rule as being subjective."

It is obvious that the sole criterion used by the Commission does not equate with "public interest" and it is doubtful that its determinative effect can be justified on the basis that it tends to form a pattern with other evidence conclusively proving its qualifications in the public interest.

(b) *Erroneous interpretation of the "transaction" requirement under Section 5(2) of the Interstate Commerce Act*

While the Act does require the submission of a "transaction" for the approval of the Commission, it is plain from the facts presented, and the Commission should have found, that Minneapolis could acquire the stock held by the trustees of the McNear estate, as well as the stock held by the minority share holders, all of whom would have no reason for refusing to sell to the Minneapolis. In fact on the very day that the contract of sale was made to the successful applicants, counsel for the trustees had prepared an acceptance of the Minneapolis offer (Exhibit H-76, R. 1956-1957, 1445). If any doubt did exist on that question, the Commission could fully protect its decision in favor of the Minneapolis application by limiting the time within which the Minneapolis would be permitted to acquire the stock pursuant to the decision. It would seem that any case involving two carriers competitively seeking to purchase the stock of a third carrier would involve the same question, since only one of them could have a contract for the purchase of the stock at the time it presented its transaction for the Commission's approval. If the limited view taken by the Commission is supported, it would appear that cases arising under Section 5(2) could never have the benefits of a comparative hearing. The undesirability of such a result is obvious from the fact that the comparative hearing process is greatly in aid of the administrative process to determine the presence of public interest. Thus, it was recognized in *Midwestern Gas Transmission Co. v. F. P. C.*, 258 F. 2d 660, 669, 670, (D.C. Cir. 1958), that comparative hearings have the effect of raising issues of public interest and that it is important to have



a great number of such issues not only presented but considered. Just as the Commission should have looked through the form of the transaction to see the substance of the Pennsylvania-Santa Fe control, so also this Court should look through the form of the Commission's decision purporting to afford a comparative hearing.

That the Commission's comparative consideration was at most halfhearted, is apparent from this statement following a description of the Minneapolis proposals:

"Other benefits and advantages claimed by the Minneapolis in the matter of adequate car supply and the coordinated service which would result if Western were controlled by the Minneapolis are of record, but in view of our findings herein with respect to the disposition of its application, the details thereof need not be specifically described. \* \* \* (R. 33)

It is absolutely clear from this statement that the Commission did not make a true comparative analysis of the two competitive applications. To undertake a true comparative analysis, the Commission would have had to consider every material advantage claimed by Minneapolis in support of its application. Obviously, since the Commission was deciding the case on other grounds, it felt no need to make a comparative analysis and it did not.

### 3. The Failure of the Commission Properly to Interpret and Apply the Applicable Anti-trust Provisions

Strong arguments have been urged by the Minneapolis throughout this controversy questioning the Commission's disposition of its claims based upon violations of the Anti-trust Laws. While these matters are left to the Minne

apolis for argument, the State of Minnesota is very much concerned that its interests not be prejudiced by condoning improper actions so as to reward the actors with the fruits of wrong and, also, that the likelihood of monopolistic competitive practices not be ignored as a factor in the Commission's decision in this proceeding. If the economy of the State of Minnesota is to suffer as a result of a Commission determination that the Pennsylvania-Santa Fe anti-trust violations are to be condoned and subordinated to other considerations in the public interest, then, at the very minimum, the people of this state are entitled to a clear, logical explanation of what those other considerations are and why the national anti-trust policy is being subordinated to them.

### THE SCOPE OF REVIEW BY THE DISTRICT COURT

The error of the District Court relative to its scope of review consisted in its observation that the existence of substantial evidence to support the conclusion reached by the Commission in itself prevented further judicial inquiry into any facet of the Commission's action. If the Commission's reasoning was based on correct interpretations of the law, and if its actions were not arbitrary and capricious, then its application of the law to the particular proposals would be free from second guessing by the Courts and this is properly so. But where the Commission's reasoning is faulty, its orders cannot be sustained, even if the Court could substitute correct theories which the Commission might have used to reach the same result. This principle<sup>1</sup> was established in *S. E. C. v. Chenery Corp.* 318 U.S. 80 (1942), where the court stated:

<sup>1</sup>See also Davis, *Administrative Law Treatise*, 1978, Volume 2, Sections 16.05 and 16.09.

"Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197, 61 S. Ct. 845, 853, 85 L. Ed. 1271, 133 A.L.R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board'. *Ibid.* Compare *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 488, 490, 62 S. Ct. 722, 729, 730, 86 L. Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an ad-

ministrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

"This must be particularly so in a comparative hearing, for erroneous assumptions by the Commission in such a hearing would necessarily deprive the affected competitive applicant of a fair consideration of its proposal. The substantial evidence test is not very meaningful when, according to the District Court apparently, there is evidence sufficient to support any of the contentions before the Commission." Thus, following the terminology used in *Johnson Broadcasting Co. v. F. C. C.*, supra, so far as the evidence is concerned all of the applicants satisfy the bare qualifications for its proposal and it is only the comparative qualifications which determine the ultimate result. Since the Commission's ultimate finding was not that the Santa Fe-Pennsylvania proposal most fully promoted public interest but only that such proposal was "consistent with the public interest," it is obvious that the Commission's findings were inadequate if it erroneously found that the Minneapolis application did not meet the bare qualifications for lack of "transaction".

"The Commission might have granted the application of Minneapolis for sole control and ownership, which was strenuously opposed by all those carriers who wanted Western to remain independent and neutral. The Commission might have authorized the Rock Island and the Nickel Plate to join the Pennsylvania and the Santa Fe in joint ownership and control of Western. The Commission concluded that the application of Pennsylvania and Santa Fe was consistent with the public interest and should be granted. That we think, under the evidence and the law, it had power to do; even if that conclusion was wrong, it cannot be said to be arbitrary or capricious and is therefore binding upon this Court." (R. 104-105.)

In the judicial review of the Commission's order the competitive nature of the proceeding involved cannot be ignored. Consideration now of the Pennsylvania-Santa Fe proposal cannot proceed as if Pennsylvania and Santa Fe were the only applicants for control of the Western merely considering whether there is substantial evidence which would support that application. If the Commission erred in any of the respects contended, then its decision must be set aside so that a true comparative consideration of the applications could be made.

## CONCLUSION

It is submitted that the Orders of the Interstate Commerce Commission which appellants sought to have set aside, annulled and suspended by the District Court are unlawful and based upon erroneous interpretation of the law and that the District Court should have so decided. The decision of the District Court should be reversed accordingly.

Respectfully submitted,

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**FIL**

2117 CARBONATE

7/11/1944



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OCT 24 1959

**JAMES R. BROWNING, Clerk**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

**Nos. 12, 27, 28.**

THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY, ET AL.,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

**BRIEF ON BEHALF OF THE STATE OF ILLINOIS.**

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**BRIEF ON BEHALF OF THE STATE OF ILLINOIS.**

**STATEMENT.**

This controversy, while directly involving the judicial review of an order of the Interstate Commerce Commission, basically concerns the question of the acquisition by the Pennsylvania and Santa Fe of the stock of Western.

1. The interested railroads will be referred to hereinafter as follows: Toledo, Peoria and Western Railroad Company as "Western," The Pennsylvania Railroad Company as "Pennsylvania," and The Atchafalaya, Topeka and Santa Fe Railway Company as "Santa Fe," and Minneapolis & St. Louis Railway Company as "Minneapolis."



under the statutory standards of Sec. 5 of the Interstate Commerce Act (49 U. S. C. Sec. 5). That section requires that any acquisition "be consistent with the public interest". While initially there were four alternatives presented to the Interstate Commerce Commission,<sup>2</sup> the issue has now been narrowed to two, namely: (1) does the public interest lie in preserving Western's existing transportation function as a bridge-line through the Peoria Gateway by stock ownership in Western's two largest connecting lines, or (2) does the public interest lie in making the future operation of Western a part of Minneapolis' railroad and substantially altering Western's present operation and transportation function?

### **Western Is an Illinois Railroad.**

The State of Illinois has a substantial interest in this proceeding. Western lies almost entirely within Illinois. Its executive and general offices, yards and shops are located in Illinois. Western's employees reside in Illinois. Although Western is primarily a bridge-line, it provides an essential transportation service upon which the communities along its line are completely dependent.<sup>3</sup> Its function as a bridge-line provides the communities along its line a type of service which would otherwise not be

2. They included: (1) joint control by Santa Fe-Pennsylvania; (2) sole control by Minneapolis; (3) multiple ownership; and (4) denial of both applications or dismissal of Minneapolis' application.

3. All of the communities along the line of Western intervened in the proceedings before the Interstate Commerce Commission and the United States District Court in support of Santa Fe-Pennsylvania control. These communities are: the City of Peoria, the City of East Peoria, the City of Bushnell, the City of Canton, the City of LaHarpe, the Village of Lomax, the City of Warsaw, the City of Forrest, the City of Fairbury, the City of Gridley, the City of Gilman, the City of Sheldon, the City of Watseka, the City of Eureka, the Village of Secor, the City of Washington and the City of Chenoa.

economically justified. This is particularly true as to the line west of Peoria.

The interests of the States of South Dakota and Minnesota involved in this proceeding are, at best, remote and indirect. They are based upon the unwarranted assumption that Minneapolis traffic would be diverted under Santa Fe and Pennsylvania's control of Western. Unlike the conditional nature of these interests, the interests of the State of Illinois are directly and immediately affected by the admitted loss of existing benefits which would result from the absorption of Western into the operations of Minneapolis. Such losses are involved in the alteration of Western's existing transportation function, the abandonment of Western's executive and general offices and shops at Peoria, the substantial reductions in employment, and the cutbacks in spending within the State of Illinois.

### **The State of Illinois Interests in Western**

Illinois has a direct interest in the economy of the area of Central Illinois served by Western. That interest is manifest in the continued agricultural and industrial development of that area, in the economy of the City of Peoria and the Peoria area, the further development of railroad service to the communities along Western's line, the development of Peoria as a major rail gateway, and finally—but of major consequence—in Western's employees. Each of these interests are directly related to the preservation of Western's existing transportation function and its continued development as a bridge-line in transcontinental traffic. The disadvantages inuring to each of these points of interest by altering Western's existing transportation function under the proposal of Minneapolis is apparent and compelled the participation by the State of Illinois in this proceeding before the Interstate Commerce Commission, the District Court and now this appeal.

Since this brief is in answer to both the brief of Minneapolis in docket No. 12 and the briefs of South Dakota and Minnesota in Nos. 27 and 28, we shall devote the first Section to the contentions of Minneapolis and the second to the position of our sister states, South Dakota and Minnesota.

### **SUMMARY OF ARGUMENT.**

1. The criterion upon which the Commission's decision rests relates to the preservation of Western's unique transportation function. This is reflected in the finding that Western's present policies must "in all respects" be continued. This finding is, in turn, based upon adequate subsidiary findings which establish the national and local importance of retaining Western's function as a "short line connection" for the sixteen carriers with which its function is interrelated.

2. The finding bearing upon the preservation of Western's transportation function and the subsidiary findings upon which it is based, all have a direct relation to the relevant legislative standards as expressed in Sec. 5 and the National Transportation Policy, and the decision falls within the scope of the Commission's discretionary authority under those standards. The specific benefits accruing to the public as a consequence of Santa Fe and Pennsylvania control are, moreover, consistent with the objectives of Sec. 5 as reflected in previous Commission decisions.

3. The Commission's decision reflects that a fair hearing was accorded Minneapolis and its proposal to substantially alter Western's transportation function. The Commission's findings indicate that due consideration was given to the nature and scope of the Minneapolis proposals. Adequate findings were made, reflecting the basis for the Commission's rejection of the Minneapolis proposal and these findings fall within the scope of the authority conferred.

upon the Commission under the legislative standards of Sec. 5 and the National Transportation Policy.

4. The Commission's decision fully reflects the basis upon which the two competing proposals were weighed and evaluated. The findings upon which the Minneapolis proposal was rejected are supported by substantial evidence. Judicial review of Commission orders are limited to a determination of whether the essential basis of the Commission's judgment is disclosed and the findings upon which that determination was made are fully supported by the record.

5. The interest of the employees of Western are substantial and must be considered under any Section 5 proposal. Such interest cannot be relegated to the acceptance of a dole under the Washington Job Protection Agreement.

6. The improvement of the financial position of Minneapolis in order to protect marginal lines in South Dakota and Minnesota at the expense of ruining a strong railroad in Illinois is not in the public interest. The Commission also found, based upon substantial evidence, that there will be no diversion of traffic from Minneapolis by reason of the Santa Fe-Pennsylvania control of Western.

## ARGUMENT.

## I.

**ANSWER TO THE CONTENTIONS OF MINNEAPOLIS.****A. The Commission's Order Awarding Control of Western to Santa Fe and Pennsylvania Is Based Upon Adequate Findings.**

The basic structure of Minneapolis' argument concerning the alleged inadequacy of the Commission's findings is based upon the premise that the Commission adopted as the basic finding, upon which the proceeding turned, the need for "separate and independent management" of Western.

The complete answer, in brief, to this entire argument is that the proceeding was not resolved by the Commission upon the basis of a "standard" concerning the "separate and independent management" of Western. No finding concerning the "separate and independent management" of Western was in fact made by the Commission anywhere in its report. The alleged "standard," moreover, of "separate and independent management" of Western bears no reasonable relationship to any of the findings which were in fact made by the Commission, whether ultimate, subsidiary or evidentiary. No such "standard" was expressed in the actual language of the report nor may it reasonably be inferred.

Minneapolis' creation of a fictitious "standard" upon which the proceeding was allegedly resolved, its attempt to relate this "standard" to the Commission's alleged prejudgment of the proceeding, and other devices which it has employed in presenting the issues to this court,

constitute an ill conceived attempt to avoid a logical and analytical treatment of the issues relative to the adequacy of the findings. Nowhere in its entire discussion of the issues relative to the adequacy of the findings does Minneapolis come to grips with the findings which were in fact made by the Commission or the theory upon which the decision of the Commission is based. The Commission's report and the opinion of the District Court, are completely ignored.

The justification for the failure of Minneapolis to deal with the findings which were made and the theory upon which the decision rests apparently lies in its contention that its proposal was excluded from the Commission's consideration at the inception of the hearing. A review of the findings and of the District Court's interpretation of the findings is therefore essential to demonstrate the error of Minneapolis and to show the basis for the Commission's approval of Santa Fe-Pennsylvania control of Western.

The Commission's ultimate findings are that the Santa Fe-Pennsylvania proposal to preserve Western's existing transportation function is "consistent with the public interest," [the statutory standard of Sec. 5(c)(2)] and that the benefits to be derived from the operation of Western under Santa Fe-Pennsylvania's proposal would be "in furtherance of the overall National Transportation Policy declared by the Congress" (R. 49, 39). These ultimate findings were the result of the subsidiary finding that the public interest required that Western's existing transportation function "in all respects" be preserved (R. 45).

The need for retaining Western's existing transportation function is expressed in such basic subsidiary finding, in turn, rests upon the following evidentiary findings: 1) that Western occupies a geographically strategic



position as a "direct east-west line" (R. 21); (2) that Western performs a strategic function as an overhead bridge carrier for transcontinental traffic operating through the Peoria Gateway, bypassing the congested terminals of Chicago and St. Louis (R. 21); (3) that Western's function as an overhead carrier and its existing traffic policies of (a) maintaining strict neutrality between its sixteen connecting lines and (b) attempting to participate in a haul of traffic no matter how slight, are a natural result of and are directly related to Western's strategic geographic position and the function which it performs and accounts for Western's success (R. 21); (4) that Western's successful operation originated with the utilization of its plant as a bridge carrier between the Santa Fe at its western terminus and Pennsylvania at its eastern terminus (R. 21); (5) that, as a consequence of Western's strategic position, the function which it serves, and its traffic policies, Western has assumed national importance in the Nation's railroad system as a "vital direct link" supplying the "short-line connection" for east-west traffic (R. 45); (6) that Western's existing function and its traffic policies thus make available Western's natural advantages to the maximum number of its connecting railroads (R. 21, 31, 45); and that (7) the retention of Western's existing transportation function and the preservation of its existing policies have significant consequences both to the railroad industry as well as the public generally (R. 45). The Commission found furthermore, that, with the exception of Minneapolis and the States of South Dakota and Minnesota, its conclusion that the retention of Western's existing function was essential to the public interest was shared by all of the parties to the proceeding, including all of the railroad intervenors, all of the communities served by Western and all of the shippers who appeared in the proceeding as witnesses (R. 31).

A significant quotation from the Commission's order which contains a recital of decisive facts indicates most clearly the rationale for the Commission's decision:

"Situating as it is between the Santa Fe at Lomax on the west and the Pennsylvania at Effner on the east, Western receives its long haul and provides a vital direct link essential to the type of through service which is becoming increasingly important not only to the shipping public but to the railroads as well. Fast, strong, and reliable through transportation service is necessary in order for the railroads adequately to compete with the other modes of modern transportation, and Western, as a direct east-west line, supplies the short-line connection for providing this through service with a minimum of delay..

"Public interest demands that the present policies of Western in all respects be continued." (R. 45.)

The District Court recognized the significance of this finding in its analysis of the issue regarding their adequacy. The Court stated (R. 104):

"The Commission specifically found that 'public interest demands that the present policies of Western in all respects be continued.' It concluded that this result would be attained if the two carriers which had contributed the greatest volume of traffic with Western, one from the East and one from the West, should be accorded joint ownership. As stated, it appears that some 70% of Western's interline traffic is exchanged with these two railroads. This constitutes about two-thirds of Western's total traffic. \* \* \* It is entirely reasonable to expect that the two carriers which are largely responsible for the excellent condition of Western today, will, by sheer self-interest continue with the same incentive in the future."

It should be noted that, if any single finding may be deemed to constitute a decisive determination in this proceeding, it is the finding referred to and quoted by the District Court, i.e., that "Public interest demands that the pres-

ent policies of Western in all respects be continued." This concept includes all of the aspects of the findings enumerated above which relate basically to the preservation of Western's unique transportation function. The retention of this transportation function is of vital interest and importance to the State of Illinois.

**B. The Findings Upon Which the Commission Based Its Award of Control to Santa Fe and Pennsylvania Bear a Direct Relation to Section 5, the Objectives of the National Transportation Policy and Are Consistent With Other Commission Decisions.**

Minneapolis' argument that the concept of "separate and independent management" is unrelated to the standards of Sec. 5 of the Interstate Commerce Act or the objectives of the National Transportation Policy is again the red herring conjured up completely outside the language and the intent of the Commission's order. The Commission's decision rests squarely upon the findings referred to above which relate to *the best use* of Western's transportation plant, the function which it is to perform and its orientation within the complex network of the American railroad system.

The statutory standard of Sec. 5 requires that the Commission give specific consideration to (1) "the effect of the proposed transaction upon adequate transportation service to the public \* \* \*" and (2) "the interest of the carrier employees affected." This court has held that Section 5 requires the "best use of transportation facilities," *New York Central Securities Co. v. United States*, 287 U. S. 12, 25, and that specific requirement was determined as expressed by the Commission in finding that Santa Fe-Pennsylvania control maintained the "best use of [Western's] transportation facilities." Moreover, the

Santa Fe-Pennsylvania proposal was consistent with "the interest of the carrier employees affected."

The finding that Western's existing transportation function must be preserved and the findings upon which that ultimate finding is based all have an obvious relation to the objectives of the National Transportation Policy which deal with the promotion of "safe, adequate, economical and efficient service," the fostering of "sound economic conditions in transportation" without "unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices."

Apart from the general considerations which led the Commission to conclude that the preservation of Western's present policies was essential to the public interest, the Commission also found that certain specific advantages would accrue to the public as a result of Santa Fe-Pennsylvania control of Western. These benefits included (1) the continued access of the public to local management (R. 33); (2) the economic stimulus such ownership would afford the area served by Western's lines (R. 32); (3) the promotion of industrial development along Western's lines (R. 33); (4) expanded industrial markets (R. 33); (5) an increase in Western's car supply (R. 33); (6) the realization of economies in operation by Western and (7) the technical and managerial assistance afforded by Santa Fe-Pennsylvania to Western (R. 33). These benefits have been consistently held by the Commission to provide the significant factors in other proceedings involving the application of Sec. 5 and the National Transportation Policy. *Niagara Junction R. Co. Control*, 267 I. C. C. 649, 660 (1947); *Pacific Coast R. Co. Control*, 282 I. C. C. 607, 609 (1951); *Savannah & Atlanta Ry. Co. Control*, 282 I. C. C. 39, 51 (1951); *Wabash R. Co. Control*, 247 I. C. C. 365, 370 (1941); *Wheeling & L. E. Ry. Co. Control*, 267 I. C. C. 163, 183 (1946).

### **C. Minneapolis Was Accorded a Fair Hearing.**

Minneapolis, by creating a mythical "standard" upon which the Commission is said to have "prejudged" the proceeding, ignored the rationale upon which the Commission actually based its decision as expressed in specific findings. Ignoring the Commission's analysis of the need for preserving Western's existing transportation function because its proposal obviously did not coincide with this objective, Minneapolis argues that the relative merits of the two proposals "should have" been decided on the basis of a "comparative" evaluation of certain other criteria.

#### **1. Minneapolis' Argument Reflects a Misunderstanding of the Function of Judicial Review.**

The argument of Minneapolis is based upon a fundamental misconception of the function of judicial review of a proceeding such as this. It is not the function of this court to examine the evidence to determine whether it will permit a finding more favorable to Minneapolis. The review function of this court is discharged if the "essential basis" of the Commission's judgment is sufficiently disclosed so that the court can satisfy itself that the Commission had performed its function. *Alabama Great Southern R. Co. v. United States*, 340 U. S. 216, 227. In analyzing the adequacy of the findings, the court must review the report on the basis upon which the decision rests, not just on the basis of the evidence adduced by Minneapolis or the factors upon which it relied. The findings, moreover, essential to support the validity of an order will vary with the context of the situation presented. *United States v. Pierce Auto Lines*, 327 U. S. 515, 532, (1954). However, it is not necessary for the Commission to comment on all of the evidence produced. In speaking

about the adequacy of findings and the evidence the Illinois Supreme Court in *Atchison, Topeka & S. F. Ry. Co. v. Commerce Commission*, 335 Ill. 70 said at page 95:

"It does not follow because evidence appearing in the record was not commented upon in the order that it was not considered by the commission. The question for a judicial review of the order is whether the findings of the commission on which the order is based have substantial support in the evidence."

likewise, in *Chicago Junction Ry. Co. v. Commerce Commission*, 412 Ill. 579, it was held at page 584:

"We believe that the findings of fact by the commission, *which need not recite each bit of evidence which leads to the conclusion of fact*, are sufficient to support the order, and are, in compliance with the terms of the statute." (Emphasis added.)

In this proceeding the Commission expressed the "essential basis" of its judgment in its report and made all the necessary findings to support its judgment consistent with the relevant legislative standards.

#### **The Commission's Rejection of the Minneapolis Proposal Fell Within the Scope of Its Discretionary Authority Under Section 5 and the National Transportation Policy.**

Minneapolis argues that, if adequate findings had been made relative to its proposal, a decision favorable to it in *Fe-Pennsylvania* would have been "impossible" under the standards of Sec. 5 and the National Transportation Policy as a matter of law.

This argument raises a basic question regarding the purpose of Sec. 5 and the scope of the Commission's discretion in its application. What Minneapolis is saying is that, under Sec. 5 and the National Transportation Policy, the Interstate Commerce Commission could not lawfully approve a proposal for stock control of a carrier



involving the retention of the carrier's corporate identity and separate operation of the controlled carrier when afforded the alternative of what is, in effect, a corporate merger allegedly resulting in large scale economies and "expanded" rail service. Emphasis is placed upon alleged "economies" and "expanded" rail service, which are said by Minneapolis to be determinative of the issues and the criteria of Sec. 5 and the National Transportation Policy.

While the term "public interest" in Sec. 5 has been defined to relate to "conditions of economy," it also was deemed to embrace "appropriate provision and best use of transportation facilities." *New York Central Securities v. United States*, *supra*, p. 25. This interpretation, we submit, substantially broadens the concept and permits the broadest area of administrative judgment in the application of the standard. No single objective or group of objectives of the National Transportation Policy, moreover, may be said to be determinative of all proceedings under Sec. 5, since these objectives have been held to be mutually inconsistent in their application to the context of particular proceedings. *Schaffer Transportation Co. v. United States*, 355 U.S. 83, at pp. 94-95. That the achievement of economies and establishment of "expanded" rail service are not absolute but relative objectives of Sec. 5 is reflected in Sec. 5(2)(c), which directs the Commission to give consideration to the effect of a proposal upon the "carrier employees affected," as well as to its effect upon "adequate transportation service to the public." The application of this mandate is illustrated in the Commission's findings in this proceeding. The Commission found that Minneapolis' proposed "expanded" rail service would be "extremely harmful" to other carriers and to the ability of such carriers to continue to provide adequate rail service to the public (R. 32), and also found that the economies which might be achieved by Minneapolis would be *affected*

at the expense of Western's employees (R. 32). The achievement of Minneapolis' overall objectives were, moreover, incompatible with the Commission's basic objective of preserving Western's existing transportation function which the Commission recognized as essential (R. 30). The achievement of large-scale economies, such as allegedly would result from a merger, would be more than offset by separate operation of Western which the Commission found to be essential to the preservation of Western's transportation function. The kind of "improvement" and "expansion" of rail service via Western, which was proposed by Minneapolis was also incompatible with the retention of Western's present traffic policies upon which the preservation of its transportation function was completely dependent and the Commission so found (R. 30).

There is no basis to support the argument of Minneapolis that a decision based upon the retention of the corporate identity and separate operation of a controlled carrier constitutes an abuse of the Commission's discretion under Sec. 5 or the National Transportation Policy, either in an absolute or a "comparative" sense. Separate operation of a controlled carrier is recognized to be consistent with the objectives of Sec. 5 since Sec. 5(2) specifically provides for acquisition of control through stock purchases.

### **3. Adequate Findings Were Made Relative to Minneapolis' Proposal for Control of Western.**

Minneapolis' argument that it was denied a comparative hearing rests finally upon the alleged inadequacy of findings with respect to the evidence which Minneapolis adduced at the hearings. It argues that "no" findings were made with respect to the (1) economies and (2) service proposals which it advanced (Brief, p. 33), (3) its economic motivations (Brief, p. 35), and (4) that the Commission "brushed off" the evidence of its traffic losses

which would result from Santa Fe-Pennsylvania's control of Western (Brief, pp. 30-31).

The case of Minneapolis was predicated upon certain affirmative proposals, all of which related in one way or another to the achievement of economies arising out of its absorption of Western and the establishment of certain operating changes which would affect the combined service of Western and Minneapolis as a merged operation. While these objectives may otherwise be generally regarded as consistent with the relevant legislative standards, the Commission found that their application under the circumstances involved in this proceeding would be disadvantageous. Specific findings were made which indicate that Minneapolis' service proposals would be "extremely harmful" to other carriers (R. 32) and that the alleged economies would be effected "at the expense of Western's employees" (R. 32). Minneapolis' economic motivations in prosecuting its application for control were, moreover, not "ignored" by the Commission, for it specifically found that Minneapolis sought to acquire control in order to enhance its financial stability (P. 30). Moreover, the mere fact that the Commission did not comment about the evidence of Minneapolis to the extent that Minneapolis might desire does not mean that the Commission did not give it full and thorough consideration. *Atchison, Topeka & S. F. Ry. Co. v. Commerce Commission, supra; Chicago Junction Ry. Co. v. Commerce Commission, supra.*

Minneapolis' case was also predicated upon certain defensive considerations which it contended made its control of Western imperative. These arguments related to the alleged diversion of its traffic which it asserted would result from Santa Fe-Pennsylvania control. The Commission's detailed and comprehensive consideration of this evidence can hardly be characterized as a "brushing off" of this issue. The Commission considered this issue to be

vital significance in the proceeding and devoted four pages of its report to an analysis of appellant's claims of loss of revenue through traffic diversion (R. 33-37).

It is, therefore, apparent that adequate findings were made with respect to the essential elements of Minneapolis' proposal.

#### 4. The Commission Balanced the Factors Upon Which This Decision Rests.

A comparative evaluation of Minneapolis' case with that of the other railroad intervenors and the Santa Fe Pennsylvania proposal did not require findings in the form in which Minneapolis asserts, nor does it require that any special technique be employed in arriving at the findings. The "essential basis" of the Commission's judgment is sufficiently disclosed so that this court can intelligently discharge its function of judicial review. *Alabama Great Southern R. Co. v. United States*, *supra*, at pages 227-8. This, in the final analysis, is the only function of findings. The form which the findings take and the techniques employed in arriving at the findings are not significant as long as the "essential basis" of the Commission's judgment is disclosed. The balancing of the factors upon which the decision rests, required by *Schaffer Transportation Co. v. United States*, *supra*, was fulfilled in this proceeding. The Commission considered the advantages of the economies and new service routes but found that these advantages would be initially outweighed by the interests of air and the economic consequences of the service routes on other rail carriers (R. 32). Finally, Minneapolis' proposal to abolish Western as a separately operated carrier was found to be outweighed by the need for preserving Western's existing transportation function under its present policies (R. 39, 45).

**D. The Findings Upon Which the Commission Based Its Rejection of Minneapolis' Proposal Are Supported by Substantial Evidence.**

The Commission made three significant findings regarding the merits of Minneapolis' proposal which reflect the basis upon which its plan for control was held not to be in the public interest. The Commission found that the proposal of Minneapolis "unequivocally" contemplated the abandonment of Western's policy of neutrality as to its 16 connecting lines (R. 30). It also found that Minneapolis' proposed service policies would be "extremely harmful" to Western's other connecting carriers (R. 32), and that any economies secured by Minneapolis' absorption of Western would be at the expense of Western's employees (R. 32). While Minneapolis has attacked the substantiality of the evidence as to each of these findings, yet there was more than sufficient evidence to support these basic findings.

**1. The Finding that Minneapolis' Absorption of Western Would Result in Materially Altering Western's Transportation Function is Supported by Substantial Evidence.**

One of the fundamental determinations upon which the decision rests is the need for retaining Western's existing policies (R. 45). These policies include the maintenance of strict neutrality between its connecting lines and soliciting for a haul of traffic no matter how slight (R. 21). The Commission found that Minneapolis' proposal "unequivocally" contemplated the disappearance of Western as a "neutral connection for the other 15 carriers with which it presently works" (R. 30). This subsidiary finding was decisive in this proceeding because it reflects the basis upon which Minneapolis' proposal was ultimately rejected. The importance of the finding lies in the fact that the retention of Western's policies of neutrality towards its

connecting carriers is essential to the preservation of Western's transportation function as a bridge line which the Commission found to be the "best use" of Western's transportation facilities.

Recognizing this to be a fact, Minneapolis now contends that it too would maintain a policy of neutrality with respect to Western's connections because, "as a matter of survival," it "could not do otherwise" (Brief, p. 31). Although it attempts to avoid a direct attack upon this finding, Minneapolis, in effect, is challenging the basis for the Commission's finding that its proposal "unequivocally" would abolish Western's policies of neutrality as to its connecting lines. To support its contention, Minneapolis points to its dependence upon the Peoria Gateway and upon bridge traffic, but ignores the comprehensive and detailed outline of its traffic program offered by Mr. Nelson, its Traffic Vice President, which was specifically predicated upon the diversion of traffic from Western's other connections to the combined route resulting from the merged operations. Mr. Nelson's testimony clearly reveals that Minneapolis, with Western merged, expressly proposed to pursue a policy of aggressive solicitation to divert traffic and short-haul Western's other connecting lines (R. 1177-1184). The carriers which Minneapolis' Traffic Vice President admitted would be short-hauled under his policy are all existing connections of Western and include the Illinois Central (R. 1195), the G. M. & O. (R. 1197), the C. & E. I. (R. 1197), the Wabash (R. 1198), the Milwaukee (R. 1198) and the North Western (R. 1198). Traffic would also be diverted from the Minneapolis-Chicago lines of the Burlington, Rock Island, Milwaukee and North Western (R. 1198, 1200).

Western's transportation function would also be materially altered by the limited use that Minneapolis would make of Western's facilities. Minneapolis' plan for diverting



the traffic of Western's connecting lines through the establishment of new interchanges and service routes did not involve Western's line west of Peoria (R. 1178-84). Minneapolis' line west of Peoria parallels the route of Western and the economics of Minneapolis' control would require the consolidation of the Santa Fe traffic which presently is interchange at Lomax to the Minneapolis interchange at Nemo. This Santa Fe traffic is practically the sole support of railroad service presently being afforded the communities along the west end of Western. Western's function as contemplated by the Minneapolis traffic program would substantially alter the present traffic route of Western and would be disadvantageous to the interests of the State of Illinois and to the communities which are entirely dependent upon Western for rail service.

**2. The Finding that Minneapolis' Absorption of Western Would Be Harmful to Western's Connecting Lines Is Supported by Substantial Evidence.**

The Commission found that the traffic policies proposed by Minneapolis under its "unified operation theory" would be "extremely harmful to other carriers" (R. 32). Minneapolis argues that this finding is not supported by substantial evidence since it is based upon a "confused claim" of "one witness" (Brief, p. 31). This broad finding, however, is not based solely upon the testimony of Mr. Atkinson, the President of the Wabash. The Rock Island introduced evidence which tended to show that \$6,000,000 of its freight revenue annually was susceptible to diversion under Minneapolis' control of Western (R. 1545). The Nickel Plate estimated that a "substantial" portion of its Peoria traffic would be susceptible to diversion under Minneapolis' unified operations with Western (R. 1325), and Minneapolis itself, made it clear that its traffic program was based upon diverting traffic from Western's connecting lines (R. 1184).

**3. The Finding that Any Economies Effectuated Under Minneapolis' Absorption of Western Would be Secured at the Expense of Western's Employees Is Supported by Substantial Evidence.**

The State of Illinois has a substantial interest in the 527 families residing in the State of Illinois which could be displaced either by layoffs or transfers through Minneapolis' merger of Western. The interests of these men and women, who have built a pattern of living within a community, constitute a vital part of the public interest and we submit that their interests were properly weighed by the Commission against the alleged economies in its finding that economies would be secured at the expense of Western's employees (R. 32).

This finding is based upon Minneapolis' comptroller's testimony that, of the estimated \$1,770,945 reduction in annual operating expense allegedly accruing from the merging of Western, \$1,327,062 would result from the elimination of at least 256 positions now held by Western's employees (R. 1377, 1379). Minneapolis attacks this finding by emphasizing the importance of economies as an objective of the National Transportation Policy (Brief, p. 46) but ignores that, under Sec. 5(2)(c)(4), the Commission is specifically enjoined to consider "the interest of the carrier employees affected." Appellant also attacks the finding with the assertion that "ultimate job security" lies only in "efficient" operation; that "featherbedding" and "uneconomical operations" cannot provide a basis for job security. There is no evidence of record to support the contention that the separate operation of Western is either "inefficient" or "uneconomical" or that the retention of Western's employees constitutes "featherbedding" in any sense of the term. Quite to the contrary, the Commission found that Western is a successful railroad operation performing a vital public service (R. 21, 44).

Finally, Minneapolis attacks the finding on the basis that the impact of its proposal would be "cushioned" by Minneapolis' abidance with the Washington Job Protection Agreement, which would provide for payments of 60% of regular compensation for five years and severance pay equal to one year's earnings for the employees whose positions would be terminated. This argument is irrelevant to the finding. The payment of compensatory allowance does not alter the fact that \$1,327,062 of the estimated economies would be secured by the elimination of at least 256 positions. The Commission's duty to give consideration to the interests of employees is not discharged by simply providing for compensatory allowances to dismissed personnel for a limited period pursuant to the provisions of Sec. 5(2)(f)<sup>5</sup>. These provisions make such compensatory allowances mandatory only after a transaction subject to Sec. 5(2) has been determined to be "consistent with the public interest." Thus, before the Commission reaches Sec. 5(2)(f), it has a prior obligation with respect to employees, to consider their interests in making a public interest determination under Sec. 5(2)(c)<sup>6</sup>. This is precisely what the Commission did in this proceeding as reflected by the finding.

5. It would be no argument against the Commission's prescription of safety facilities to say that the employee can get compensated by an F. E. L. A. action if he is hurt.

6. This is reflected in the Commission's decision in *Fort Worth & D. C. Ry. Co. Lease*, 247 L. C. C. 119 (1942), where the Commission indicated that, while it theretofore had given consideration to the interest of the carrier employees affected to the extent of imposing appropriate conditions, it was now required under Sec. 5 (2) (c) "to give consideration to the interest of such employees in determining whether the transaction is consistent with the public interest" (p. 127). (Emphasis supplied.)

## II.

**ANSWER TO SOUTH DAKOTA AND MINNESOTA.****A. South Dakota's Contentions.****1. South Dakota's Branch Lines.**

South Dakota's argument that the Santa Fe-Pennsylvania "combine" would adversely affect the branch lines of Minneapolis in South Dakota assumes that the only public interest lies in the economic benefit to Minneapolis (Brief, p. 9). The benefit to South Dakota through the creation of a theoretically stronger railroad which could then support the low density marginal branch lines in that State through either the destruction of a strong main line railroad in Illinois or by converting it into a branch line is not necessarily in the public interest. Besides, it is the very function of the Commission to weigh and determine the evidence. As this court so aptly said in *Baltimore and Ohio R. Co. v. United States*, 298 U. S. 349 at page 359:

"The Commission alone is authorized to decide upon weight of evidence or significance of fact."

In this case, the Commission found that the acquisition by Santa Fe-Pennsylvania "will be consistent with the public interest" and the record substantiates that finding. The evidence clearly shows that the status of Western as a strong transcontinental bridge carrier will remain the same through the acquisition by Santa Fe and Pennsylvania, while it would be greatly changed through Minneapolis' ownership. The Commission obviously felt that the preservation of the existing service provided by Western's operation in Illinois was of the greater importance in the over all public interest. And this is the function of the Commission with which the court, in the absence of arbitrariness, should not interfere. In *Georgia Public Service*

*Commission v. United States*, 283 U. S. 765, Mr. Justice Brandeis speaking for a unanimous court stated at page 775:

"It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions, or the consistency of its conclusion with those reached in similar cases."

South Dakota's argument regarding the possible abandonment of the Minneapolis branch line is, moreover, predicated upon the assumption that Minneapolis' traffic would be diverted by the Santa Fe and Pennsylvania "combine". The record is said to be "uncontroverted" with respect to the vulnerability of the Minneapolis' traffic and the Commission is said to have "brushed off" this evidence (S. D. Brief, p. 9). This contention is fully answered by our reply to the similar contention of Minneapolis at pages 16-17 *supra*, and the four pages of the Commission's order devoted to the contention of Minneapolis on traffic diversion (R. 33-37).

It should be pointed out that South Dakota and Minnesota, whose interests in this proceeding are predicated entirely upon the alleged effect of such diversion of traffic, have only made the most general and sweeping attack upon the specific findings made by the Commission.

While completely unrelated to its branch line argument, South Dakota attacks the intervention of the communities along Western's line and the Railway Labor Executives Association which intervened in support of Santa Fe-Pennsylvania control of Western (S. D. Brief, p. 11). The significance of the unanimous public support accorded Santa Fe-Pennsylvania acquisition by the municipalities,

7. While this case involved the determination of rates, there should be no difference in standards for court review of just and reasonable rates in the public interest and acquisitions and mergers consistent with the public interest.

business associations and shippers along Western's line cannot be dismissed with the assertion that these interests have been victimized by a Santa Fe public relations campaign. If the communities have been victimized, so also has the State of Illinois and the active participation by the State in this proceedings from the inception refute any "public relations victimization". Actually, no reply need be made to this assertion since South Dakota does not indicate how these interests (municipalities and shippers) will be hurt by Santa Fe-Pennsylvania control. Furthermore, it would seem that the communities and shippers along Western's line would be better able to judge their own interest than South Dakota.

Our answer to Minneapolis' similar contention (*supra*, page 22) is a complete reply to South Dakota's statement that labor would not "suffer" under Minneapolis absorption of Western since it is protected by the Washington Job Protection Agreement. It seems rather presumptuous for South Dakota to advocate the reduction of fully employed persons in Illinois to the position of a dole under a job protection agreement.

## 2. The Anti-Trust Effect.

The argument that Santa Fe and Pennsylvania's joint control of Western would violate the anti-trust laws is based upon the assumption that the proposed transaction constitutes a "gigantic railroad merger" which "unifies" the operations of the Santa Fe and Pennsylvania from "tidewater" to "tidewater" (S. D. Brief, p. 13). Joint control of another carrier is not in any sense a merger of the owning roads. This is particularly true where, as here, they are an eastern and a western carrier subject to the checks and balances inherent in such control. The Commission expressly recognized this factor in its order:

... \* \* No greater protection could be afforded to



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Nos. 12, 27 and 28.

Office Supreme Court, U.S.

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OCT 26 1959

JAMES R. BROWNING, Clerk

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1959.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

vs.

*Appellant,*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

STATE OF SOUTH DAKOTA AND PUBLIC UTILITIES  
COMMISSION OF THE STATE OF SOUTH DAKOTA,

vs.

*Appellants,*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

STATE OF MINNESOTA AND MINNESOTA RAILROAD AND  
WAREHOUSE COMMISSION,

vs.

*Appellants,*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA.

**BRIEF FOR APPELLEES, THE ATCHISON, TOPEKA  
AND SANTA FE RAILWAY COMPANY, THE PENN-  
SYLVANIA RAILROAD COMPANY AND PENNSYL-  
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carriers interchanging traffic with Western than to have ownership divided equally between the largest connecting carrier in the east and the largest one in the west. Under this built-in system of checks and balances, it is inconceivable for the Santa Fe to permit impairment of service or discriminatory solicitation with respect to eastern connections, or the Pennsylvania with respect to western ones, \* \* \* (R. 46).

### **B. Minnesota's Contentions.**

Minnesota's brief is manifestly no more than a reiteration of the arguments advanced by Minneapolis. Minnesota's arguments relative to the alleged inadequacy of the findings (Brief, pp. 10-14), the alleged failure of the Commission to accord Minneapolis a comparative hearing (Brief, pp. 14-19) and the alleged erroneous interpretation by the District Court of the scope of judicial review (Brief, pp. 19-22) have been fully treated in our answer to the contentions of Minneapolis in the first section of this brief.

### **CONCLUSION.**

We therefore respectfully submit that the decision of the District Court entered on September 16, 1958 should be affirmed.

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Dated: Oct. 22, 1959.

BR.

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FOR DYFELLS, HI  
ATWISCH TOPIKA AND SANTA  
RAILWAY COMPANY, THE PENNSYL-  
ANIA COMPANY.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959.

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**No. 12.**

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,  
*Appellant,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

---

**No. 27.**

STATE OF SOUTH DAKOTA AND PUBLIC UTILITIES  
COMMISSION OF THE STATE OF SOUTH DAKOTA,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

---

**No. 28.**

STATE OF MINNESOTA AND MINNESOTA RAILROAD AND  
WAREHOUSE COMMISSION,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

---

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA.

---

**BRIEF FOR APPELLEES, THE ATCHISON, TOPEKA  
AND SANTA FE RAILWAY COMPANY, THE PENN-  
SYLVANIA RAILROAD COMPANY AND PENNSYL-  
VANIA COMPANY.**

---

This brief is submitted jointly by The Atchison, Topeka and Santa Fe Railway Company, The Pennsylvania Railroad Company and Pennsylvania Company, appellees herein, the successful applicants in the proceeding before the Interstate Commerce Commission which is here under review. The three cases to which this brief is addressed (Nos. 12, 27 and 28) are direct appeals by Minneapolis & St. Louis Railway Company and the States of South Dakota and Minnesota and their respective utility commissions from the order of the District Court for the District of Minnesota, Fourth Division, dismissing the complaint in *Minneapolis & St. Louis Ry. Co. v. United States*, 165 F. Supp. 893 (R. 91-105).<sup>1</sup> By its decision the District Court in effect sustained the order of the Interstate Commerce Commission in *Toledo, Peoria & Western R. Co. Control*, 295 I. C. C. 523 (R. 17-49), authorizing Santa Fe and Pennsylvania, through its subsidiary, Pennsylvania Company, to acquire joint control of Western by purchase of its stock and dismissing appellant's application to acquire control.

1. The respective parties and other railroads involved will be referred to hereafter as follows:

The Atchison, Topeka and Santa Fe Railway Company.....	Santa Fe
The Pennsylvania Railroad Company.....	Pennsylvania
Minneapolis & St. Louis Railway Company.....	Appellant or Minneapolis
Toledo, Peoria & Western Railroad Company.....	Western
The New York, Chicago & St. Louis Railroad Company.....	Nickel Plate
Chicago, Rock Island & Pacific Railroad Company.....	Rock Island
Chicago, Burlington & Quincy Railroad Company.....	Burlington
Wabash Railroad Company.....	Wabash
The Monon Railroad.....	Monon

### **STATEMENT OF THE CASE.**

The statement of the case in appellant's brief (pp. 4-14) is more of an argument than a statement of the facts. It seems necessary, therefore, to describe briefly the factual background of the case and the proceedings below.

#### **Western's Transportation Function.**

Western's line is about 240 miles in length extending across Illinois from Effner at the Indiana border through Peoria to Lomax, Illinois, and Keokuk, Iowa (See Map, Appendix A). Western's general offices, as well as its shops and yards, are at East Peoria.

Western connects at Effner with the line of the Pennsylvania to Logansport, Indiana, and east. It is, in effect, merely an extension of that line. On the west it connects with the main line of the Santa Fe at Lomax and with the Rock Island and Burlington at Keokuk. In the Peoria area, it connects with a number of railroads, including the Burlington, Rock Island and Minneapolis from the west and the Nickel Plate and New York Central from the east. It has connections with a total of 16 railroads (See Exhibit 6 to Santa Fe-Pennsylvania application; R. 149).

Western's line through Peoria forms a short, direct bridge route between the east and the west, bypassing the congested terminals of Chicago and St. Louis (R. 21). Western has capitalized upon its strategic location by maintaining a policy of strict neutrality between all its connections and rendering fast, dependable service as a bridge carrier (R. 21). As a result, more than two-thirds of its revenues are derived from bridge traffic (R. 22). In another recent case Western was described as "a valuable link for transcontinental shipments" occupying "a

particularly important position in the Nation's transportation system". See *Illinois-Missouri Terminal Ry. Co., Purchase*, I. C. C. Finance Docket No. 18752 (sheets 43-44 of mimeographed report, dated April 2, 1956).

### **Relationship with the Competing Applicants.**

Western's relations with all its principal connections are in part complementary and in part competitive. This is true of Santa Fe and Pennsylvania—and Minneapolis, as well.

Santa Fe's line extends to Chicago, but does not reach Peoria or St. Louis. Pennsylvania serves both Chicago and St. Louis. Although they have ordinarily solicited for their long hauls through Chicago and St. Louis, both Santa Fe and Pennsylvania have realized the value of Western's route and have played a major part in its development (R. 34). Western provides a vital link for fast, through service between the lines of the Santa Fe to the Southwest and Pacific Coast and the lines of the Pennsylvania extending throughout the industrial East (R. 45). Western's success as a bridge line dates from the construction of its connection with the Santa Fe at Lomax in 1927 (R. 21). It is undisputed that since that time—for more than 30 years—Santa Fe and Pennsylvania have cooperated with Western in coordinating their schedules and services to provide a fully competitive service via Western's route (R. 21-22). The value of their contribution to the development of Western's route was recognized by a number of large shippers using this route (R. 46); and it was demonstrated by the greatly increased use of their connecting services during World War II (Ex. II-5, pp. 11-12; R. 42, 1644-45). As a result of this cooperation Western's interchange with Santa Fe and Pennsylvania accounts for about 70 per cent of its interline traffic and revenues and two-thirds of its total traffic (R. 22).



Western receives its long haul on traffic interchanged with the Santa Fe and Pennsylvania at Lomax and Effner, but most of its interchange with its other connections is at Peoria near the center of its line (R. 45, 21). Minneapolis, which connects with Western at Peoria, competes with the latter for traffic moving west of Peoria (R. 1207-08). Its line is complementary only to that part of Western's line extending east from Peoria to Effner. There are several other routes through the Peoria gateway which do not include Western's line; and the traffic Minneapolis handles via the competitive routes formed by its line and the Nickel Plate and New York Central (Peoria and Eastern), respectively, is more than double that which it interchanges with Western (Ex. H-128, pp. 1-3; R. 1590, 2001-04).

#### **Negotiations for the Purchase of Western's Stock.**

Appellant's treatment of the negotiations for purchase of Western's stock is in no sense a statement of the facts. It is not only argumentative, but it makes no reference to the findings of the Commission which are in direct conflict with much of what is said. Nor does it refer to the evidence on which those findings are based.

Appellant's arguments with respect to these matters are dealt with fully in our reply to the contention that the stock purchase negotiations involved a violation of Section 10 of the Clayton Act (15 U. S. C. 20). It should be sufficient here to point out that Santa Fe, on May 25, 1955, and shortly thereafter, entered into contracts to purchase all of Western's stock from the holders thereof. These contracts were expressly made subject to the approval of the Interstate Commerce Commission.

### **Proceedings before the Interstate Commerce Commission.**

Having contracted to buy all of Western's stock, Santa Fe on June 28, 1955, agreed, subject to Commission approval, to sell 50 per cent of Western's stock to Pennsylvania Company, a wholly owned subsidiary of the Pennsylvania. Thereafter Santa Fe, Pennsylvania and Pennsylvania Company filed a joint application seeking Commission approval under Section 5(2) of the Interstate Commerce Act (49 U. S. C., Sec. 5), for Santa Fe and Pennsylvania Company each to acquire and hold 50 per cent of the Western stock.

Minneapolis filed a similar application seeking Commission approval of its proposal for sole acquisition of Western's stock.

The two applications were considered at a consolidated hearing before a Commission examiner at Peoria, Illinois. The hearing was an extended one, from February 1 to 14, 1956. Numerous witnesses were heard and many exhibits received in evidence. Several other railroads intervened in the consolidated proceeding to protect their interests. Four of these, the Rock Island, Nickel Plate, Burlington and Wabash, sought authority, under varying circumstances, to participate equally in the ownership of Western with any carrier or carriers that might be authorized to acquire it.

The examiner issued a proposed report recommending approval of the Santa Fe-Pennsylvania acquisition and rejection of appellant's application.

Thereafter, upon exceptions and replies to exceptions to the proposed report, the case was argued orally before Division 4 of the Commission (Commissioners Mitchell, Arpaia, and Winchell). Division 4 issued a comprehensive report approving the application of Santa Fe-Pennsylvania and rejecting that filed by appellant.

The Commission was confronted, for present purposes, with two diametrically opposed plans. Santa Fe-Pennsylvania proposed the continued operation of Western as a separate carrier under its present service and traffic policies so as to preserve Western's unique function as a short, direct east-west bridge carrier. It was supported by many interveners, including the cities and towns served by Western from one end of the line to the other,<sup>2</sup> leading civic and business organizations, shippers located in the area served by Western, and The Railway Labor Executives Association (representing Western's employees). Other shippers, both local and off-line, appeared and testified in support of the Santa Fe-Pennsylvania application.

Appellant's application, on the other hand, contemplated a complete departure from the policies on which Western's success was based. Instead of operating as a separate bridge carrier working closely with all its connections, Western would be integrated into Minneapolis for ownership, management and operation and its headquarters and shops would be moved from Peoria. The traffic policies of the combined operation would be aimed at increasing the volume of traffic moving over the Minneapolis line extending northwest from Peoria.

Appellant's proposal was supported only by the states of Minnesota and South Dakota. It was strongly opposed by the State of Illinois. No shippers or local community interests lent their support.

In approving the Santa Fe-Pennsylvania application, the Commission found that "public interest demands that the present policies of Western in all respects be continued" (R. 45). Those policies would only be continued under the

<sup>2</sup> Communities which intervened were Keokuk, Iowa, and Varsaw, LaHarpe, Lomax, Bushnell, Canton, Peoria, East Peoria, Bureau, Secor, Gridley, Chenoa, Fairbury, Forrest, Gilman, Vatsoka and Sheldon, Illinois.

~~Santa Fe-Pennsylvania plan.~~ In rejecting the Minneapolis application the Commission found that it contemplated "the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works" (R. 30); that the policies contemplated by Minneapolis "would be extremely harmful to other carriers" (R. 32), and that most of the proposed economies "would be effected at the expense of Western's employees" (R. 32).

Appellant's petition for reconsideration was denied by the full Commission.

### **Proceedings in the District Court.**

The description in the appellant's brief (pp. 13-14) of the proceedings in the District Court is neither complete nor accurate. It fails to point out that the State of Illinois, the City of Peoria, the Peoria Association of Commerce, as well as the municipalities and their civic and commercial organizations along Western's entire route, intervened to defend the Commission's order.<sup>3</sup> And the characterization of the District Court's opinion is both argumentative and inaccurate.

Appellant raised four main contentions before the District Court. In its opinion dismissing the complaint, the District Court rejected these contentions, holding: (1) that Section 10 of the Clayton Act (15 U. S. C. 20) did not appear to be applicable to the situation here involved and that, in any event, it was not a bar to approval because the authority of the Commission in the premises is made exclusive and plenary, regardless of the anti-trust laws, by express provision of Section 5(11) of the Interstate Commerce Act (R. 98-99); (2) that the Commission gave due consideration to the effect of the acquisition on the com-

3. These interests are now appellees in this Court.

petitive situation in the light of this Court's ruling in *McLean Trucking Co. v. United States*, 321 U. S. 67 (R. 99-102, 103-104); (3) that the advantages and disadvantages of the two competing applications were weighed and considered in the light of the public interest and that the Minneapolis application, therefore, was not denied comparative consideration (R. 102-103); and (4) that the Commission's order was based on adequate findings supported by substantial evidence (R. 105).

### QUESTIONS PRESENTED.

Appellant's statement of the "Questions Presented" is nothing more than an outline of argument. Briefly, the questions presented are:

1. Is the Commission's decision consistent with the standards of Section 5 of the Interstate Commerce Act and the National Transportation Policy and was appellant accorded a fair hearing under the circumstances of the case?
2. Is the Commission's order based upon adequate findings and are the findings supported by substantial evidence?
3. Do any of the considerations involved in Section 1 of the Sherman Act and Section 7 of the Clayton Act require judicial rejection of the Commission's order?
4. Is Section 10 of the Clayton Act a bar to Commission approval of the Santa Fe-Pennsylvania application?
5. Was appellant accorded an adequate review by the District Court?

## SUMMARY OF ARGUMENT.

1. The Commission's approval of the Santa Fe-Pennsylvania application to acquire control of Western was a proper exercise of its administrative discretion and within the scope of its statutory authority. The report recognizes Western as a successful working organization which has proved itself by rendering a valuable public service to the communities it serves, to the shippers who use its services, and to the 16 railroads with which it connects. Western today plays an important part in the nation's transportation system as a short, direct east-west bridge line working closely with all its connections to provide a vital link for the fast through service which is becoming increasingly important not only to shippers, but to the railroads as well, in meeting the competition of other modes of transportation. By its decision the Commission has recognized the "valuable transportation service" provided by Western and the important part Santa Fe and Pennsylvania have played in its development. It has concluded that separate operation of Western under their joint control will insure the continuance of this vital service in the pattern and under the policies that have proved so successful in the past and with excellent prospects for future growth and development. These public benefits can be assured without adversely affecting the service or economic welfare of other railroads; and the interests of Western's employees will be fully protected.

Thus the Commission's determination reflects full consideration of the effect of the proposed acquisition on adequate transportation service, on other carriers and on Western's employees as required by Section 5 of the Interstate Commerce Act. It also squares with the National Transportation Policy and its objectives of fostering "sound economic conditions in transportation and among

the several carriers" and of "developing, coordinating and preserving" an adequate national transportation system.

The Commission's report reflects consideration of the interests of all parts of the public directly concerned with Western's future, including the interests of appellant. Appellant's competing application was fully considered. The alleged benefits of appellant's plan for integrating Western into its own operations, including the proposed economies and service changes, were weighed against the adverse effects on Western's employees and on the other railroads connecting with Western. These considerations and the fact that appellant's plan contemplated the disappearance of Western as a separate and neutral connection for the other 15 carriers with which it presently works, led to the rejection of the Minneapolis application. The District Court properly held that the balancing of these factors is for the Commission, not the courts.

The Commission's conclusion that Western's present policies toward its connections will be continued under Santa Fe-Pennsylvania control is supported by findings which demonstrate that it will be in the self-interest of Santa Fe and Pennsylvania to continue such policies and by the checks and balances which the Commission found to be inherent in the control of an east-west bridge carrier, such as Western, by an eastern and a western railroad, respectively. Appellant's assertion that it would maintain a policy of neutrality if permitted to gain control of Western is belied by its specific plan to divert traffic from Western's other connections to its own line extending north and north-west from Peoria.

2. Appellant's argument that the Commission failed to make findings on material issues simply ignores the findings actually made. The Commission specifically recognized the benefits Santa Fe and Pennsylvania receive from Western's route, their economic interest in its future develop-



ment and the major part they have played for over 30 years in providing the connecting services which have made its present development possible—to the point where today the traffic interchanged with Santa Fe and Pennsylvania amounts to about two-thirds of Western's total traffic.

Appellant also attacks a number of unrelated findings on the ground that they are not supported by the record. In doing so appellant ignores or misconstrues the substantial evidence on which these findings are based. This is discussed in some detail in Section II of the Argument.

3. The decision of this Court in *McLean Trucking Co. v. United States* makes it clear that the Commission is not required to measure a proposed acquisition under Section 5 of the Interstate Commerce Act by the standards of the antitrust laws. Pursuant to the Court's ruling in that case the Commission analyzed the effects of the proposed acquisition on the competitive situation in practical and concrete terms and concluded that the benefits to be derived from the operation of Western under the control of Santa Fe and Pennsylvania will be in furtherance of the overall national transportation policy and that there will be no undue curtailment of competition. More than one-third of the report is devoted to a discussion of the various factors bearing on the competitive situation.

Appellant's charge that the acquisition of Western by Santa Fe and Pennsylvania will lead to the monopolization of east-west gateways and suppression of the Peoria gateway is without support in the record. There are too many available routes through the Chicago, St. Louis and Peoria gateways to permit monopolization. The suggestion that Santa Fe and Pennsylvania would use their control of Western to suppress the Peoria gateway to the advantage of the other gateways is contrary to the evidence and the Commission's findings. Any attempts at suppression of Western would only divert Western's traffic to other avail-

able routes. Moreover, in view of the benefits Santa Fe and Pennsylvania receive from Western's route and their record of 30 years' cooperation with Western in developing traffic over that route, it is only common sense to conclude that the future of Western under their joint control will be one of continued growth and development. It defies common sense to assert, as does appellant, that having spent 30 years in helping to build up Western to its present position, the Santa Fe and Pennsylvania are now seeking to acquire control of Western in order to destroy it.

The charge that the joint acquisition of Western by Santa Fe and Pennsylvania will increase their "monopolistic power" is also without support in the record. There is no evidence of monopolistic power; and no combination or merger of Santa Fe and Pennsylvania is involved in such acquisition. As an eastern and a western railroad, respectively, they cannot afford to work together to the detriment of their other respective connections on the east and on the west.

4. Section 10 of the Clayton Act is not applicable to the transaction here involved and even if it were applicable, it would not constitute a bar to the Commission's approval of the acquisition of Western by Santa Fe and Pennsylvania. The Commission's authority under Section 5 of the Interstate Commerce Act is exclusive and plenary and neither the antitrust laws nor any other provisions of law can operate as a bar to the consummation of a transaction which has been approved by the Commission.

## ARGUMENT.

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### I.

**THE COMMISSION'S DETERMINATION OF THE PUBLIC INTEREST REFLECTS FULL CONSIDERATION OF THE TWO COMPETING APPLICATIONS. IT IS CONSISTENT WITH THE STANDARDS OF SECTION 5 AND THE NATIONAL TRANSPORTATION POLICY AND DID NOT DEPRIVE MINNEAPOLIS OF A FAIR HEARING.**

Appellant says that the Commission adopted the "false" standard of "separate and independent management" to determine the public interest; that this standard collides with the National Transportation Policy; and that it was a "predetermined" standard which "automatically" excluded Minneapolis and deprived it of a fair hearing.

The term "separate and independent management" is set out in quotation marks in appellant's brief, but it appears nowhere in the Commission's report. What the Commission referred to was "separate and independent operation" (R. 31, 26), a well-understood concept in the railroad field. The distinction may seem slight, but it is significant.

By coining this term here for the first time,<sup>4</sup> appellant creates a straw man, which it proceeds to demolish by pointing out that the management of a controlled carrier cannot be entirely independent of its owners. Of course, no such contention was ever advanced.

The concept of "separate and independent operation" does not have its source, as appellant contends, in the contract between Santa Fe and Pennsylvania. Nor is it true.

4. In its Jurisdictional Statement (p. 23), appellant used the correct term: "separate and independent operation".

as appellant states, that it cannot be found in any "published authority" (brief, p. 19). The concept is not a new one and it is reflected in the published reports of the Commission. In a number of cases, which reflect its experience over the years in the administration of Section 5 of the Interstate Commerce Act, the Commission has recognized that separate operation of a controlled carrier under its own local management is an effective factor in preserving existing traffic relationships with connecting lines and insuring continued neutrality in service.<sup>5</sup> This has been demonstrated by actual experience in the case of the Wabash as the Commission noted in *Detroit, Toledo & Ironton R. Co. Control*, 275 I. C. C. 445, 490 (1950). And as far back as 1924 the Commission imposed a condition requiring separate operation of the Clinchfield Railway, which like Western, was a bridge line connecting with a number of other railroads. *Clinchfield Ry. Co. Lease*, 90 I. C. C. 112, 132-133 (1924).

But the Commission's concept of the controlling public interest in this case was not just separate operation as such. It went much deeper than that as a review of the Commission's report will show.

**A. The Report Shows that in Arriving at Its Determination of the Public Interest the Commission Gave Full Consideration to the Two Competing Applications, As Well As to the Other Interests Involved.**

The Commission was confronted with two radically different proposals for the future operation of Western's line. Santa Fe and Pennsylvania proposed the continued operation of Western as a separate carrier under its present local

5. *Wheeling & L. E. Ry. Co. Control*, 267 I. C. C. 163, 176 (1946); *D. T. & L. R. Co. Control*, 275 I. C. C. 455, 490, 491-92 (1950); *Pacific Coast R. Co. Control*, 282 I. C. C. 600, 607 (1951); *Spokane International R. Co. Control*, 295 I. C. C. 425 (1956).

management and its present service and traffic policies. The Minneapolis proposal for integrating Western's line into its own operations in the interest of economy involved the disappearance of Western as a separate and neutral connection for the other 15 carriers with which it presently works. In addition to these two proposals the Commission had to consider the applications of four other railroads, the Nickel Plate, Rock Island, Burlington and Wabash, for inclusion in the transaction under varying circumstances (R. 25).

The problem, then, was what should be done with Western—under which proposal would it best serve the nation's transportation system? In resolving this problem the Commission was to be guided by the specific statutory standards of Section 5(2) of the Interstate Commerce Act and by the more general provisions of the National Transportation Policy.

The standard of Section 5(2) (b) is the broad one of consistency with the public interest; and in passing on any proposed transaction the Commission is specifically directed by Section 5(2)(c) to give weight to: (1) its effect on adequate transportation service; (2) the effect of including, or failing to include, other railroads; and (3) the interest of the carrier employees affected. 49 U. S. C. § 5 (2). (b) and (c).

Objectives of the National Transportation Policy, which are relevant here, are: (1) the promotion of safe, adequate, economical and efficient service; (2) the fostering of sound economic conditions in transportation and among the several carriers; and (3) the encouragement of fair wages and equitable working conditions—all to the end of developing, coordinating and preserving an adequate national transportation system. 49 U. S. C. preceding § 1.

In applying these broad standards to a given case the

Commission, as "the agency that is expert in the field," must resolve such conflicts as may exist in the light of the overall public interest. *Schaffer Transportation Co. v. U. S.*, 355 U. S. 83, 92 (1957). A brief review of the Commission's report will show that that is what was done in this case.

The report begins by describing Western; the important place it occupies in the nation's transportation system as a strategically located east-west bridge route; the policy of neutrality toward all its connections by which it attained that position; its excellent local management; and the important part Santa Fe and Pennsylvania have played in Western's development (R. 20-22).

The report then describes the principal railroads involved, their relations with Western and the various proposals for control of Western (R. 25-30).

Following this the report turns to the Minneapolis and reviews in detail its plan for integrating Western's line with its own railroad, the substantial economies which Minneapolis expects to achieve, and the plan for establishing new service routes east of Peoria which is designed to divert traffic from Western's other connections to the Minneapolis line extending north and west of Peoria. The report points out that the Minneapolis proposal unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works. It also states that most of the proposed economies will be at the expense of Western's employees and that the proposed new service routes would be extremely harmful to the other carriers (R. 30-33).

Turning to the Santa Fe-Pennsylvania proposal for continued operation of Western as a separate carrier under its present local management and present policies, the report analyzes the claims of traffic diversion by Minneapolis

and others and concludes that Santa Fe-Pennsylvania control would be in furtherance of the overall national transportation policy and would not jeopardize the traffic of the other carriers or unduly curtail competition (R. 33-39). The report notes the valuable transportation service Western is now furnishing, the support of the Santa Fe-Pennsylvania application by Western's employees, the general insistence by shippers and by the communities along its line that its present status be maintained and the importance to Western of the connecting service of Santa Fe and Pennsylvania in providing a fast transcontinental route competitive with other modes of transportation and concludes that the public interest demands "that the present policies of Western in all respects be continued" (R. 44-45).

The request of other carriers for inclusion in the control of Western is rejected because diffusion of control would lessen the incentive of Santa Fe and Pennsylvania for the future development of Western and because it is not necessary to protect their traffic. In this connection the report points to the opportunities for future development of Western's territory and other advantages flowing from Santa Fe-Pennsylvania ownership and concludes finally that on the basis of all the considerations disclosed in the report the application of Santa Fe and Pennsylvania should be granted in preference to that of Minneapolis (R. 45-49).

From this outline of the report it is apparent that the controlling consideration in the Commission's view of the public interest was the need for preserving Western's status as a separately operated bridge line working closely with all its connections. The key finding, as the District Court recognized (R. 104), was that "Public interest demands that the present policies of Western in all respects be continued" (R. 45).

This was not a "predetermined conclusion" reached "at the outset" to automatically exclude Minneapolis as the



latter contends (brief, pp. 19-32). As the District Court pointed out, the report shows that this conclusion was reached after consideration of the evidence and the contentions of all parties to the proceeding, including Minneapolis (R. 102-104).

**B. The Findings on Which the Commission Based Its Approval of the Santa Fe-Pennsylvania Application Are Consistent With the Standards of Section 5 and the National Transportation Policy.**

The Commission's conclusion that the public interest will best be served by the continued operation of Western as a separate carrier under its present policies is supported by a number of specific findings throughout the report. These findings reflect the unique part Western plays in the nation's transportation system and the general insistence, by all parts of the public most directly concerned, that Western's separate operating status and present policies be continued.

Thus the Commission found that Western has capitalized on its strategic location as an east-west bridge carrier through Peoria by its policy "to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight" (R. 21). More than two-thirds of its revenues are derived from bridge traffic (R. 22). "Western, as a direct east-west line, supplies the short-line connection" for providing the type of through service which is becoming increasingly important "not only to the shipping public but to the railroads as well" in competing with "the other modes of modern transportation" (R. 45).

This is not the first time that the Commission has recognized the important part Western plays in the nation's transportation system. In *Illinois-Missouri Terminal Ry.*

*Co., Purchase*, I. C. C. Finance Docket No. 18752 (1956), the Commission described Western as follows:

"Although only 231 miles long, *the Toledo, Peoria & Western occupies a particularly important position in the Nation's transportation system* as it forms a short, direct bridge route between the east and west which avoids the congested areas of Chicago and other major gateways. Modern equipment, dependable and convenient schedules, connections with all main lines, and complete icing and livestock facilities make the Toledo, Peoria & Western a valuable link for trans-continental shipments \* \* \* (Sheet 43-44 of mimeographed report, dated April 2, 1956). (Emphasis supplied.)

Thus Western, as presently constituted, has proved itself as a "well-managed, independently operated railroad furnishing a valuable rail transportation to the public" (R. 44). Those who have a real stake in its future have insisted, therefore, that its present pattern of operation and its present policies must be continued.

This is true of the intervening railroads, which are among its principal interchange connections (R. 31). It is true of the off-line shippers who use Western as a bridge line for through traffic (R. 31, 46); and the communities and local shippers along Western's line who benefit from the present ready access to local management and the excellent local service which has been made possible by Western's success as a bridge line (R. 31, 44-45, 46-47, 369). It is true of the cities in the Peoria area which have a direct and vital interest in the retention of Western's headquarters and general offices in East Peoria and in preserving employment for their citizens (R. 31, 21, 47). It is true of Western's employees whose jobs are at stake (R. 22, 44). Only Minneapolis and its two supporting intervenors, South Dakota and Minnesota, advocated "the disappearance of Western as a separate and independent operating carrier" (R. 31).

The proposed acquisition of Western by Santa Fe and Pennsylvania is entirely consistent with the concept of the overall public interest expressed in the above findings. This is demonstrated by many specific findings relating to the Santa Fe-Pennsylvania plan for the future operation of Western.

Under their proposal Western would continue to function as a separate carrier under its present local management and under the traffic and service policies which have contributed so much to its success (R. 24). This plan reflects the natural community of interest resulting from the geographical location of Western as an important link between the Santa Fe on the west and the Pennsylvania on the east in providing fast through service via the Peoria gateway (R. 45).<sup>6</sup> Thus Western receives its long haul on traffic interchanged with Santa Fe and Pennsylvania, while its interchange with most of its other connections, including appellant, is in the Peoria area at the center of its line (R. 45, 21). Much of Western's success as a bridge line dates from the construction of Western's connection with the Santa Fe at Lomax in 1927 (R. 21). Since that time Santa Fe and Pennsylvania have cooperated with Western in coordinating their schedules and services to provide a

6. This natural community of interest was recognized by the various railroad consolidation plans which generally allocated Western to a system based on Pennsylvania and, in one instance, divided it between Pennsylvania and a system based on the Santa Fe (Ex. II-14, pp. 9-11; R. 566, 4694-96). It was also recognized by the Office of Defense Transportation which seriously considered having Santa Fe and Pennsylvania take over a strike-bound Western during World War II (R. 363-64).

The importance of the Santa Fe—Western—Pennsylvania route was convincingly demonstrated by the greatly increased use of Santa Fe and Pennsylvania's connecting services in World War II. Between 1939 and the peak war year, 1944, Western's total traffic increased 62 per cent; its overhead or bridge traffic increased 91 per cent; and its interchange with Santa Fe increased 142 per cent and with Pennsylvania, 105 per cent (Ex. II-5, pp. 11-12; R. 462, 644-45).

fully competitive service over Western's route (R. 21-22, 46). Service, as the Commission found, is the most important factor affecting the routing of traffic (R. 34). As a result, Santa Fe and Pennsylvania account for about 70 per cent of Western's interline traffic and revenues (R. 22).

The Commission noted the strong shipper support for the Santa Fe-Pennsylvania application based on this long record of superior service in conjunction with Western, as well as the support by the communities along Western's line and by Western's employees (R. 46, 47, 44). The Commission thoroughly analyzed the effect of the acquisition on competing carriers and concluded that there would be no undue curtailment of competition (R. 33-39). It found that the self-interest of Santa Fe and Pennsylvania would provide assurance that Western's solicitation and service policies would be continued (R. 35, 39). It found that the checks and balances inherent in the control of Western, as an east-west bridge line, by Santa Fe and Pennsylvania, together with prescribed routing conditions, would protect Western's other rail connections from impairment of service or discriminatory solicitation (R. 46, 40-41).

The Commission found other advantages in Santa Fe-Pennsylvania control. These included increased traffic for Western under the joint applicants' plan to place Effner and Lomax, where they connect with Western, on a solicitation parity with Chicago (R. 34); stimulation of industrial development in the area served by Western (R. 46, 47); technical assistance in the realization of economies in operation, advantages in purchasing and the assurance of a more adequate supply of freight cars for Western (R. 47).

In the light of the findings outlined above the District Court properly concluded that it could not substitute its judgment for that of the Commission on the broad policy

question of the public interest. The "wisdom and experience" of the Commission, not of the courts, must determine whether the proposed transaction is in the public interest. *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88 (1944).

As the Commission's report shows, Western is not just a corporate entity or a physical plant. It is a successful working organization which has proved itself by rendering a valuable public service to the communities it serves, to the shippers who use its services and to the 16 railroads with which it connects. By its decision the Commission has recognized the "valuable transportation service" provided by Western and the important part Santa Fe and Pennsylvania have played in its development. It has concluded that separate operation of Western under their joint control will insure the continuance of this vital service in the pattern that has proved so successful in the past and with excellent prospects for future growth and development. These public benefits can be assured without adversely affecting the service or economic welfare of other railroads. And the interests of Western's employees will be fully protected.

These considerations provide ample justification for the Commission's ultimate finding that the control of Western by Santa Fe and Pennsylvania will be consistent with the public interest. Certainly this determination is within the permissible scope of the broad authority granted to the Commission by Section 5(2)(b) of the Interstate Commerce Act. It reflects full consideration of the effect of the proposed transaction on adequate transportation service, the effect on the other carriers, and the interests of the affected employees, as directed by Section 5(2)(c).

The decision to preserve Western's important function in the nation's transportation system as a separately operated bridge railroad linking the east and the west and

working closely with all its connections squares with the National Transportation Policy and its objectives of fostering "sound economic conditions in transportation and among the several carriers" and of "developing, coordinating and preserving" an adequate national transportation system. It is also consistent with this Court's statement in *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25 (1932), that the broad criterion of the public interest has direct relation to the "best use of transportation facilities".

**C. The Alleged Advantages of the Minneapolis Application Were Appropriately Balanced Against the Other Factors Bearing on the Public Interest.**

Appellant characterizes the Commission's concept of the public interest as a "false, artificial and meaningless" standard which was "selected in advance" and "calculated from the outset" to secure the award to the successful applicants. This "one-sided" procedure is said to be similar to that condemned in *Schaffer Transportation Co. v. United States*, 355 U. S. 83 (1957), where an application for a proposed new truck service was denied solely on the ground that the existing rail service was adequate. But what this Court condemned in *Schaffer* was the failure to balance the alleged advantages of the proposed service against the other factors bearing on the issue of public convenience and necessity in the light of the National Transportation Policy. There was no such failure here.

Appellant lays great stress on the economies that could be effected under its plan to integrate Western's line with its own operation<sup>2</sup>, but these were not ignored. The Commission described them in considerable detail, but found that they would be largely at the expense of Western's employees (R. 32). It also found that the plan of integra-

tion which was essential to the realization of these economies meant the disappearance of Western as a separate and neutral connection for the other 15 carriers with which it presently works (R. 30).

Economies are an important consideration in determining the public interest but they are not of "controlling importance". *Virginian Ry. Co. Control*, 117 I. C. C. 67, 75 (1926). Section 5(2)(c) of the Interstate Commerce Act specifically directs the Commission to give weight to the interest of employees in determining consistency with the public interest. This is wholly apart from the obligation imposed by Section 5(2)(f), to attach specific conditions relating to job protection or dismissal pay to any order of approval. *Fort Worth & D. C. Ry. Co. Lease*, 247 I. C. C. 119, 125-27 (1941). In *Florida East Coast Ry. Co. Reorganization*, 267 I. C. C. 295, 325 (1947), the Commission said that the interests of employees in "changes of management, ownership and operation" of companies by which they are employed are of public as well as private interest.

In this case the interest of Western's employees in the retention of their jobs at Peoria coincides with the interests of the shipping public, the communities served by Western and Western's other rail connections in its continued operation as a separate carrier under its present management and its present policies. Certainly the balancing of these interests against the economies which could be realized from the unified operation of Minneapolis and Western is a task committed to the Commission, not to the courts. The District Court so held (R. 103).

Again in considering the service aspects of the Minneapolis plan the Commission also considered the interests of the other carriers connecting with Western. The Minneapolis plan for establishing new service routes via Western was admittedly designed to divert traffic from Western's other connections to the Minneapolis line extending north



and northwest from Peoria. This would be a complete departure from Western's policy of working closely with all its connections and the Commission found it would be extremely harmful to the other carriers (R. 30, 31-32). Again, as the District Court held, the balancing of these interests was for the Commission (R. 102-103).

Appellant stresses its financial difficulties prior to its reorganization more than 20 years ago and suggests that the Commission should have permitted it to acquire Western in order to strengthen its line (brief, p. 28). South Dakota and Minnesota join in this contention. Inefficient operation and excessive debt, however, were the causes of appellant's earlier difficulties. See *Associated Rys. Co. Acquisition and Securities*, 228 I. C. C. 277 (1938). Since 1936 the picture has changed entirely. The Commission found that earnings since 1936 have permitted the development of Minneapolis into a modern and efficient operating plant, relatively free from debt, and that it is now a reasonably prosperous railroad with a financial and physical picture that has been steadily improving over the past few years (R. 27-28). The Commission also found that control by Santa Fe and Pennsylvania would not result in the diversion of appellant's traffic (R. 35-37). As the District Court pointed out, the advantages which might be realized by appellant through acquisition of Western was only one of the factors which the Commission had to evaluate (R. 102).

Although appellant relies on this Court's decision in *Schaffer*, the contention that its application did not receive comparative consideration is actually based on the failure of the Commission to model its findings after the pattern suggested in *Johnston Broadcasting Co. v. F. C. C.*, 15 F. 2d 351, 357 (D. C. Cir., 1949), and to make specific find-

7. Here there was no shipper testimony to evaluate—as there was in *Schaffer*, 355 U. S. at 92. Not a single shipper testified as to the alleged benefits of the proposed new service.

ings as to every difference between the two competing applications (brief, p. 23). But the *Johnston* case dealt with two mutually exclusive applications to do the same thing—to operate a new broadcasting station—and an item by item comparison was appropriate to determine which applicant was better qualified.

Here the Commission was confronted with two radically different proposals for the future operation of an existing railroad, as well as various proposals by other roads for inclusion in control. An item by item comparison was, therefore, impracticable. The controlling question in evaluating the two competing applications was what function Western could best serve in the national transportation system. The Commission concluded that preservation of Western's present function as a separately operated bridge line was preferable to its integration into the Minneapolis line. This conclusion was reached after consideration of the interests of all elements of the public involved, including Minneapolis. Under these circumstances the failure to follow the *Johnston* formula was in no sense a denial of a fair hearing.<sup>8</sup>

Appellant (brief, pp. 29-31) attacks the Commission's finding that Santa Fe and Pennsylvania would preserve Western's present policy of neutrality toward its connecting carriers and contends that it, too, would be neutral—only more so. This argument is made without any reference to the evidence on which the Commission's finding is based. Nor is reference made to the testimony by appellant's vice-president which disclosed the plans for using the control of Western to divert traffic from Western's other connections to the Minneapolis line. In this context, appellant's claim that it was denied comparative considera-

<sup>8</sup> A similar approach to a somewhat similar problem by the Federal Communications Commission was upheld by this Court in *F. C. C. v. Allentown Broadcasting Co.*, 349 U. S. 358, 361-63 (1955).

tion boils down to a contention that the Commission should have ignored the evidence and decided in its favor.

The Commission's finding, which appellant calls a "highly theoretical assumption", is soundly based on the record and the Commission's own transportation experience.<sup>9</sup> The Commission found that:

"\* \* \*, No greater protection could be afforded to carriers interchanging traffic with Western than to have ownership divided equally between the largest connecting carrier in the east and the largest one in the west. Under this built-in system of checks and balances, it is inconceivable for the Santa Fe to permit impairment of service or discriminatory solicitation with respect to eastern connections, or the Pennsylvania with respect to western ones \* \* \*." (R. 46.)

This "built-in system of checks and balances" works in two ways:

First, Pennsylvania as an eastern road receives valuable traffic via Western from the latter's connections on the west, such as Rock Island, Burlington and Minneapolis. Santa Fe likewise receives important traffic via Western from eastern roads, such as Nickel Plate and the New York Central. Neither would want Western to be operated in such a way as to lose that traffic (R. 371-72, 575, 581-82).

Secondly, it is a well-known fact that railroads serving the east-west gateways cannot afford to favor one connection to the detriment of others. This was conceded by appellant's freight traffic manager (R. 1137) and it is reflected in the policy of the Nickel Plate (R. 1328-29). It was recognized by the Commission in *Chicago, Burlington & Quincy R. Co. Control*, 271 I. C. C. 63, 154 (1948).

Neither Santa Fe nor Pennsylvania could afford to join in any attempt to divert traffic from Western's other con-

<sup>9</sup> Appellant's suggestion (brief, p. 29) that Western, under Pennsylvania-Burlington ownership, discriminated against its other connections is without foundation in the record or in fact.

nections to routing via Santa Fe and Pennsylvania. If they attempted this, Santa Fe would antagonize all its other eastern connections and Pennsylvania would antagonize all its other western connections, including not only the lines with which each bridges traffic over Western, but also their connections at other east-west gateways which do not connect with Western.

This would be true whether Santa Fe and Pennsylvania attempted to favor each other directly by their own solicitation or indirectly through their control of Western. Perhaps appellant will argue, as it did before the Commission, that other railroads would recognize the right of Santa Fe and Pennsylvania to solicit a long haul for "their subsidiary," Western. But as joint owners of Western, Santa Fe and Pennsylvania would still be an eastern and a western carrier and, as such, they could not afford to work together to the detriment of their respective eastern and western connections.

Appellant asserts that as a small railroad it, too, would have to be neutral (brief, p. 29); but there could be no checks and balances with Western's line integrated into the Minneapolis as one railroad (R. 1325-26). *There would be no Western to observe a policy of neutrality.* The Nickel Plate and Rock Island, as well as the Wabash, offered evidence as to the detrimental effect of the Minneapolis plan on their traffic (R. 1325, 1544-45). This was corroborated by Mr. Nelson, appellant's traffic vice-president, who testified that by integrating Western's line into its service, Minneapolis would obtain "new traffic" by diverting it from the Rock Island, Milwaukee, North Western and Burlington (R. 1200, 1197-98), and by short-hauling the Gulf, Mobile & Ohio, the Chicago & Eastern Illinois, the Illinois Central and the Wabash (R. 1197, 1178-79, 1182-83). Minneapolis would "actively solicit" this traffic to divert it from these lines, all of which are connections of Western (R. 1184,

1199). This would be a far cry from Western's present policy of working closely with all its connections. Certainly the Commission was justified in finding that this policy would be harmful to other carriers (R. 32).

Referring to its own claims of diversion, Minneapolis says (brief, p. 30) that the Commission "brushed off" its "unchallenged" evidence of the loss it would suffer from the Santa Fe-Pennsylvania acquisition. This is somewhat lacking in candor. Reference should at least have been made to the five full paragraphs of the report which the Commission devoted to a careful analysis of this "evidence", which was most definitely challenged (R. 35-37). The analysis speaks for itself and fully supports the Commission's finding that Minneapolis would not be injured.

Appellant concludes its comparative hearing argument by again repeating the irresponsible assertion that the Commission adopted "in advance" an arbitrary standard that "automatically" excluded Minneapolis (brief, p. 31). The District Court rejected this contention, pointing out that the benefits claimed by Minneapolis were weighed against the interests of Western's other connections, the shippers using its services, the communities along its line and Western's employees (R. 102-103). The public interest is the interest of the "whole public" not just that of Minneapolis.<sup>10</sup> The conclusion that Western could best serve the public as a separately operated bridge carrier working closely with all its connections was in no sense an arbitrary one selected in advance, but was reached after full consideration of the claims of all the interests involved.

10. *Florida East Coast Ry. Co. Reorganization*, 267 I. C. C. 295, 325 (1947); *Detroit, Toledo & Ironton Control*, *supra*, 275 I. C. C. at 488; and *Watson Bros. Transp. Co. Inc.*, 57 M. C. C. 745, 75 (1951).

## II.

**ADEQUATE FINDINGS WERE MADE ON ALL MATERIAL ISSUES; AND THE FINDINGS ATTACKED BY APPELLANT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Appellant contends (brief, pp. 32-33) that the Commission failed to observe the requirements of Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b). That section provides that all decisions include a statement of the findings and conclusions on all material issues, as well as the reasons or basis therefor. We have already reviewed the findings which explain and support the Commission's concept of the overall public interest in the particular context of this case, pp. 19-20, *supra*; the findings on which the Commission based its conclusion that the Santa Fe-Pennsylvania application was consistent therewith, pp. 21-24, *supra*; and the findings on which the Commission based its rejection of the Minneapolis application, pp. 24-30, *supra*. This review, we think, sufficiently demonstrates compliance with the requirements of Section 8(b). However, appellant has devoted a considerable part of its brief to an attack on the manner in which the Commission dealt with a number of specific issues and we shall take them up *seriatim*.

1. *Economics and Service*: Appellant first repeats its contention that there was an "absence of any findings" respecting its economics and service proposals and the alleged benefits "of strengthening Minneapolis" (brief, pp. 33-35). We have already reviewed the findings which reflect the Commission's evaluation of these contentions, *supra*, pp. 24-26. Appellant simply ignores these findings and contends that the Commission erred because it failed to make specific findings as to evidentiary details of its integration program and service proposals. Such a detailed analysis would have served no useful purpose. The

Commission's report clearly recognized the nature and scope of these proposals in weighing them against the other factors bearing on the public interest.

2. *Economic Motivations:* Appellant says the Commission made "no findings" as to the economic motivations of the competing applicants (brief, p. 35). This is not true. The Commission found that appellant sought to acquire Western in order to reap the financial benefits of the economies to be realized through integration of its line with Western and of the added traffic which it expected to obtain for its line north of Peoria by the diversion of traffic from Western's other connections (R. 30, 32-33, 34-32).

On the other hand, the Commission recognized the perfectly legitimate self-interest of Santa Fe and Pennsylvania in cementing their already close relationship with Western when they learned that its stock was to be sold.<sup>11</sup> After pointing to the major part they had played for over 30 years in the development of Western's route (R. 21-22) and to the fact that 70 per cent of Western's traffic was interchanged with them (R. 22) the Commission stated that:

"\* \* \* The protection of interchange traffic was one of the principal reasons advanced by the applicants, and recognized by us in approving acquisition of control in *Detroit T. & I. R. Co. Control*, 275 I. C. C. 455." (R. 22.)

The considerations which led Santa Fe and Pennsylvania to seek authority to acquire control of Western are significant in a proceeding such as this because they reflect the strong interest of these two roads in the future of Western's route and in the preservation of its primary

11. Section 5(2) (c) implicitly recognizes the interest of a railroad's connecting lines in any proposed acquisition by its provision that in determining the public interest the Commission must give weight to the effect of the inclusion, or failure to include, other carriers in the transaction.



function as a transcontinental bridge line. Santa Fe had seriously considered the acquisition of Western as far back as 1942, when its future was threatened by serious labor difficulties (R. 362-64). And the first discussions with the Pennsylvania about joint acquisition of Western took place at that time (R. 363).

3. *Burlington-Pennsylvania Control*: Appellant contends that the Commission ignored Western's bankruptcy under Pennsylvania-Burlington ownership more than 40 years ago and that there has been no showing of any change in traffic or transportation conditions which would lead to a different result under Santa Fe-Pennsylvania control (brief, pp. 36-37). The Commission did not ignore Western's former receivership (R. 21) and its findings explicitly recognize the substantial changes which have taken place since that time.

Subsequent developments have proven that what Western lacked then was an effective connection at the western end of its line to complement the Pennsylvania on the east. The Burlington, with an important line directly into Peoria, had no incentive to support the western part of Western's line. The need for an effective connection on the west was met when the interchange with Santa Fe at Lomax was constructed in 1927. As pointed out in the case authorizing that interchange, "the proposed construction will aid in sustaining that part of the applicant's railroad west of Peoria" *Construction by T. P. & W.*, 124 I. C. C. 278, 279 (1927). The soundness of this prediction is amply demonstrated by the Commission's findings as to the successful growth of Western's traffic in cooperation with Santa Fe and Pennsylvania in the more than 30 years since the construction of the Lomax interchange (R. 21-22, 46).

4. *Future of the Peoria Gateway:* Appellant says the Commission made no findings as to the competition with the Peoria gateway provided by Santa Fe's route to Chicago and Pennsylvania's routes to Chicago and St. Louis (brief, p. 40). This is not true. The Commission specifically referred to such competition (R. 33) but found that:

"Under [Santa Fe-Pennsylvania] control, Western would have an increased opportunity to secure traffic now moving via other gateways. While the Santa Fe and the Pennsylvania ordinarily solicit traffic for their long hauls, they have not worked against Western, and have offered only passive resistance against Lomax and Effner, respectively, in recognition of the benefits they would receive from the Western route. Considering the greater expense of operating through a large congested terminal, Santa Fe and Pennsylvania are just about as well off financially when handling traffic via Western as they would be on the long haul through Chicago. If the Santa Fe obtains a half interest in Western, it intends to place Lomax on a parity with Chicago from a solicitation standpoint, and as the other half owner, the Pennsylvania will recognize Effner as one of its principal interchanges along with Chicago and St. Louis. While the Pennsylvania will continue to solicit its long haul to St. Louis, Effner and Chicago will be on a parity" (R. 34).

Appellant ignores what the Commission said in this finding and attempts to confuse the issue by asserting that Santa Fe and Pennsylvania would not "solicit one pound of freight for Western" and charging that the parity policy was therefore a "hoax" designed to mislead the Commission (brief, pp. 40-42).

The Commission was not misled. It did not find that *Santa Fe* and *Pennsylvania* would solicit freight for Western.<sup>12</sup> It found that under their control *Western*

12. If they did they would alienate their other eastern and western connections, respectively, which do not serve the Peoria gateway. As we pointed out at pages 28-29, *supra*, railroads serving the east-west gateways cannot afford to do this.

"would have an increased opportunity to secure traffic now moving via other gateways"—in other words, by Western's own solicitation efforts.

This is entirely consistent with the parity policy, as explained by Santa Fe's vice president, Mr. Duffy. Under that policy shippers using the Santa Fe will be advised that Santa Fe will be satisfied with routing either via Chicago or via Lomax, where it connects with Western (R. 483). This does not mean that Santa Fe will solicit traffic for Western; but it means that Western's solicitors will be "in a better position to solicit traffic which might otherwise move via the Santa Fe through Chicago" (R. 483-84, 494-95, 496-97).

Conversely, Pennsylvania, while it will continue to solicit for its long haul to St. Louis, will place Effner, where it connects with Western, on a parity with Chicago and thus increase the opportunity of Western's solicitors to secure traffic now moving via the Pennsylvania to Chicago. Pennsylvania's traffic vice-president, Mr. Carpi, so testified (R. 582, 607) and President Symes' testimony, when read in its entirety, is not in conflict with this finding (R. 557-58 as well as R. 521-22).

Contrary to appellant's assertion (brief, pp. 41-42), the testimony of Western's president, Mr. Coulter, supports the Commission's finding. His testimony recognizes that while Santa Fe and Pennsylvania will not solicit for Western, their policy of placing Lomax and Effner on a parity with Chicago will make additional reservoirs of traffic "available" to Western's solicitation efforts (R. 1582-83, 1600).<sup>13</sup> Certainly it cannot be said that the record

13. Mr. Coulter did not state, as appellant says (brief, p. 41), that under this policy Pennsylvania would still seek its long haul to Chicago or St. Louis. He said that is Pennsylvania's "present policy", but that it will be changed "to put Chicago and Effner on the same basis, on a parity, which is not the case today" (R. 1600).

lacked substantial evidence to support the Examiner's parity finding, which was adopted by the Commission.

Appellant says, however, that Santa Fe and Pennsylvania lack any incentive to develop Western's route (brief, pp. 42-43). Such incentive is not lacking.

The only economic justification for Pennsylvania's line west of Logansport, Indiana, is its connection with Western at Effner. Thus the Commission found that Pennsylvania has consistently favored interchange with Western at Effner, rather than interchange with its own subsidiary, the Wabash at Logansport (R. 43-44). When Pennsylvania interchanges traffic with Western at Effner it saves the expense of the longer haul to Chicago and avoids the congestion and switching expense at Chicago (R. 575-76, 474). The divisions it receives out of the through rates are, generally speaking, not substantially less than those it receives for a haul to Chicago (Ex. H-10, pp. 5-6; R. 508, 1679-71) and when half of Western's divisions are added to reflect its proposed 50 per cent interest in Western it will generally fare better via Effner than via Chicago (Ex. H-34, pp. 1-41; R. 1163, 1770-1810 and Ex. H-36, pp. 1-36; R. 1163, 1818-1853).

Santa Fe has a particularly strong interest in Western's route through Peoria because it does not reach the Peoria or St. Louis gateways, while its western competitors, the Rock Island and Burlington, serve the Chicago, Peoria and St. Louis gateways directly (R. 481). The movement of traffic via Western enables Santa Fe to obtain a long haul through Lomax on traffic which might otherwise move via St. Louis; in which event, Santa Fe could receive no haul east of Kansas City and might lose the traffic entirely, as the Commission found (R. 38 and see R. 481-83). This consideration has been prominent in the thinking of Santa Fe

traffic people for many years (R. 362-64).<sup>14</sup> It was recognized in the proceeding involving construction of the interchange connection between Santa Fe and Western at Lomax in 1927, when it was pointed out that "the route to be afforded by the proposed connecting track will permit of longer hauls to [Western] and the Santa Fe." *Construction by T. P. & W.*, 124 I. C. C. 278, 279 (1927).

These economic considerations explain why Santa Fe and Pennsylvania have cooperated with Western for 30 years in coordinating their schedules and services to provide a fast through route for east-west traffic (R. 21-22). Service is the "most important" factor influencing the routing of traffic (R. 34), and it is perfectly obvious that Santa Fe and Pennsylvania would not have cooperated in improving their connecting services if it was against their interests to build up traffic over Western's route.

5. *Car Supply*: Appellant next attacks the finding with respect to car supply because Santa Fe and Pennsylvania were short of cars in 1955 (brief, pp. 43-44). Of course, all routes suffer from lack of cars during periods of general car shortage,<sup>15</sup> but that does not detract from the Commission's finding which was that Santa Fe and Pennsylvania would increase the supply of cars available to Western by seeing to it that Western's car ownership obligations were met in full either by having Western increase its car ownership or by increasing their own ownership sufficiently to take care of Western (R. 47). This is supported by the record (R. 368-69).

14. The traffic manager of a large Pacific Coast shipper testified that in recent years the Santa Fe has "tended to lean toward the Lomax gateway about as freely as they do the Chicago gateway" (R. 839).

15. Appellant's reports to the Association of American Railroads showed that it was short of cars for most of the year 1955 (Ex. H-120, pp. 1-2; R. 1577, 1981-82; R. 1573-74) and its president admitted that its car ownership was not up to A. A. R. recommendations (R. 1122).

6. *Industrial Development*: Appellant attacks the finding that with the backing of Santa Fe and Pennsylvania and the assistance of their industrial departments, there are excellent prospects for locating new industries on Western's line (brief, p. 44). But the record is replete with testimony that the ownership of Western by these two strong connections (R. 486-87, 654, 658, 681, 750, 758-59, 790, 807-08, 820, 949, 950, 957-58, 965-66) and the assistance of their industrial staffs (R. 571-72, 574-75, 639-40, 759-964) would provide an economic stimulus to industrial development along Western's line. Appellant says officers of Santa Fe and Pennsylvania testified that they would prefer to locate industries on their own lines, but the testimony of the officers referred to shows that both Santa Fe and Pennsylvania will have an incentive to assist in locating industries on Western. Santa Fe, because of its late entry into Chicago, is lacking in industrial property in that area and Pennsylvania, too, is short of industrial sites in Illinois (R. 485-86, 582-83).

7. *Purchase Price*: The Commission's finding that the purchase price of \$135 per share is reasonable was based upon the consideration of a number of factors which it "explored" and which were expressed in a series of findings (R. 42). These factors included (1) the fact that the purchase price of \$135 was arrived at on the basis of an agreement between a willing buyer and a willing seller; (2) the fact that the same price of \$135 per share was offered by all of the other railroads seeking inclusion, namely, the Nickel Plate, Rock Island, Burlington, Wabash and Minneapolis; (3) the excellent physical and financial condition of Western; (4) its good earnings and operating record—its net income ranged from \$641,000 to over \$1,000,000 in the period 1950-1954 (Ex. 9-C to Santa Fe-Pennsylvania application; R. 189); (5) its strategic location which "adds to its value as a long-term investment".

(6) the valuation of its properties as fixed by the Commission for rate-making purposes; and (7) its progressive and able management.

Appellant attacks only two of these findings and ignores the rest. Appellant argues that the finding that the price was established on the basis of an agreement between a willing buyer and a willing seller does not take into consideration the fact that the same parties had entered into an earlier contract for the purchase of Western's stock at \$100 per share (brief, pp. 37-38). This argument is merely a quibble about the word "willing." The trustees repudiated the earlier understanding which called for a \$100 per share purchase price when Minneapolis offered \$133. Santa Fe, knowing that Minneapolis and Rock Island were also bidding for the stock, was willing to pay \$135 to get it (R. 23). The trustees were willing to sell at that price and not at \$100. That is the way prices are determined in the market.

Appellant says that the price of \$135 is fair and reasonable for Minneapolis but not for Santa Fe and Pennsylvania, because as sole owner Minneapolis will be able to increase the earnings of Western through economies and increased traffic (brief, pp. 38-39). This argument is necessarily speculative because the alleged savings are apparently exaggerated<sup>16</sup> and the proposed traffic program, involving a complete departure from the policies on which Western has built its success, could be harmful to Western and Minneapolis. In any event, not only Minneapolis but the Rock Island, Nickel Plate, Burlington and Wabash were all willing to pay \$135 per share if permitted to participate in the ownership of Western.

<sup>16</sup> Appellant's counsel insisted that the record clearly show "that the maximum savings are one thing and the actual program is something else" (R. 1205).



Appellant says finally that "data" as to price-earnings ratios "passed unnoticed", but there were no such data in the record. It is apparent from the findings outlined above that Western's potential earning capacity was not ignored by the Commission.

8. *Public Witnesses:* In an obvious effort to discredit the public support accorded Santa Fe-Pennsylvania's proposal, appellant says that the witnesses were "assembled" as part of a "large-scale publicity and promotional campaign" (brief, pp. 44-45). The record does not support this charge.

Appellant argues that the witnesses were not advised of the considerations underlying its proposal. It was only at the insistence of counsel for appellant, however, that the public witnesses were heard before the details of the Minneapolis plan were revealed (R. 351-52). Moreover, appellant overlooks the fact that its board chairman made a special appearance at Peoria in advance of the hearing to describe the Minneapolis plan (R. 808, 815-16). The continued participation of the local community and industrial interests in the later phases of this proceeding indicates that whatever apprehensions they may have had regarding appellant's proposal were confirmed after the drastic nature of its plans were fully revealed.

Appellant suggests that the local community witnesses were primarily concerned about possible abandonment of Western's "Iowa Branch" (brief, p. 45). But what appellant calls the "Iowa branch" is the line extending west from Peoria to Lomax and Keokuk, in other words, the entire western half of the railroad. The local communities and shippers west of Peoria have real cause for concern about future prospects of service and industrial development if Minneapolis is permitted to acquire Western. Today they are receiving "main line" service because

Western's operations over this part of its route are supported by the large volume of traffic interchanged with Santa Fe at Lomax (R. 369).

As the owner of Western, Minneapolis would have every incentive to adjust its service and solicitation policies to secure the movement of the through traffic over its own line extending northwest from Peoria, rather than over the west end of Western's line. The incentive would be to "consolidate" the interchange of traffic with the Santa Fe at Nemo on the Minneapolis, rather than at Lomax (R. 386-87). This is borne out by the fact that appellant's plans for improved service relate only to service via the Minneapolis line and Western's line east of Peoria and by the fact that its traffic plans are designed to divert traffic to its own line north of Peoria. There were no plans for improving service to the large transcontinental shippers whose bridge traffic provides the principal support for Western's line and who insisted that the excellent connecting service provided by Santa Fe and Pennsylvania affords the best assurance of continued good service via Western under their joint control (R. 46).

The cities in the Peoria area, Peoria and East Peoria, are strongly opposed to the disappearance of Western as a separate operating entity and its absorption by Minneapolis. They have a direct and vital interest in the retention of Western's headquarters and general offices at East Peoria; in preserving employment for their citizens; and in preventing the destruction of \$1,330,000 in payrolls in the Peoria area. The State of Illinois has a similar direct interest in Western, extending to its entire line.

9. *Labor:* Appellant argues that the benefits of its integration plan outweigh the adverse effect on Western's employees (brief, pp. 46-47). We have already pointed out that in rejecting the Minneapolis plan the Commis-

sion considered not only the interests of the employees, but also the interests of all the other elements of the public involved, including the intervening railroads, the communities served by Western and the shippers using its line (*supra*, pp. 20, 25). The balancing of these interests against the alleged benefits of the Minneapolis plan is a task committed to the Commission, not to the courts. This is implicitly recognized in *City of Nashville v. U. S.*, 155 F. Supp. 98, 104 (M. D. Tenn. 1957), cited by appellant.

The alleged inadequacy of the findings with respect to the issues concerning the applicability of Section 10 of the Clayton Act (brief, p. 48) and the competitive consequences of Santa Fe-Pennsylvania control of Western (brief, pp. 48-50) are dealt with in Sections III and IV, respectively of this Argument.

### III.

**THE COMMISSION WAS NOT REQUIRED TO MEASURE THE SANTA FE-PENNSYLVANIA APPLICATION BY THE STANDARDS OF THE ANTITRUST LAWS. IT GAVE FULL AND CAREFUL CONSIDERATION TO THE COMPETITIVE SITUATION AND ITS CONCLUSION THAT THE OPERATION OF WESTERN BY SANTA FE AND PENNSYLVANIA WOULD BE IN FURTHERANCE OF THE NATIONAL TRANSPORTATION POLICY AND WOULD NOT UNDULY CURTAIL COMPETITION WAS WELL WITHIN THE SCOPE OF ITS STATUTORY AUTHORITY.**

**A. The Commission's Evaluation of the Competitive Situation Conforms to the Standards Laid Down by this Court in *McLean Trucking Co. v. United States*.**

Minneapolis argues that the Santa Fe-Pennsylvania acquisition would violate the antitrust laws and that the Commission abused its statutory power in approving the acquisition. The implication is that the Commission

ignored this Court's ruling in *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), and failed to weigh the public benefits of the proposed acquisition against its "destructive effect upon competition". A review of the Commission's findings, which are wholly ignored by Minneapolis, will show the contrary.

This Court's opinion in *McLean* makes it clear that in railroad legislation enacted since 1920, Congress has not placed its principal reliance on free competition. The emphasis has been "on achieving an adequate, efficient and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business" (321 U. S. at 83).

This Court held in *McLean* that the "basic determinants" of Commission action in proceedings under Section 5(2) of the Interstate Commerce Act must be the policies expressed in that Act and in the National Transportation Policy (321 U. S. at 79-80). Proposals under Section 5(2) are not to be measured by the general policies of the antitrust laws; otherwise the provisions of Section 5(11) granting immunity from the antitrust laws to transactions approved by the Commission would be meaningless (321 U. S. at 85-86). The policy of the antitrust laws is not to be ignored, however; and it is, therefore, the duty of the Commission to consider the scope and effect of the curtailment of competition which will result from the proposed transaction along with its advantages in the light of the over-all transportation policy (321 U. S. at 86-87).

This is exactly what the Commission did, as the District Court pointed out (R. 101). The Commission finding was as follows:

"We are convinced that the benefits to be derived

from the operation of the Western under the control of the Santa Fe and the Pennsylvania as proposed will be in furtherance of the overall national transportation policy declared by the Congress, and its consummation will not unduly curtail competition in connection with the other carriers. Compare *McLean Trucking Co. v. United States*, 321 U. S. 67." (R. 39.)

This finding is supported by numerous subsidiary findings, to which we have already referred, outlining the public benefits from the control of Western by Santa Fe and Pennsylvania, the important part they have played in Western's development, and the competitive effects of the proposed acquisition upon other carriers. More than a third of the report is devoted to a discussion of the various factors bearing on the competitive situation.<sup>17</sup>

Appellant assumes that the policy of the antitrust laws was ignored because the Commission's report "does not mention" either Section 1 of the Sherman Act or Section 7 of the Clayton Act and its findings as to the competitive effects of the acquisition are not expressed in terms of the antitrust laws (brief, p. 48); but *McLean* makes it clear that this is not required. The Commission's report, which was sustained in that case, did not discuss the competitive situation in terms of the antitrust laws and made no reference to the Sherman or Clayton Acts. *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137 (1942): In that case, just as in the present case, the Commission discussed the competitive situation in practical and concrete terms reflecting the evidence of record and its "past experience with transportation operations and analogous transactions." (321 U. S. at 89.)

17. See R. 21-22, 33-34 (relationships between Santa Fe, Pennsylvania and Western); R. 25-30 (routes, size and importance of the railroads principally involved); and R. 34-41, 42-44 and 45-46 (effects of Santa Fe-Pennsylvania control on other railroads).

**B. Appellant's Charges of Monopolization of East-West Gateways and Suppression of the Peoria Gateway Are Groundless.**

Minneapolis says that the Commission should have found that the proposed acquisition would lead to "monopolization" in east-west gateways and the suppression of the Peoria gateway in favor of Chicago and St. Louis (brief, pp. 59, 61). No such findings were required. The evidence would not support them.

The alleged "monopolization" of east-west gateways is apparently just rhetoric, for Minneapolis does not amplify the charge and the facts will not support it. There are too many available routes through Chicago, Peoria and St. Louis which do not include the Santa Fe or Pennsylvania (R. 577-78; and see Map, Appendix A).

Santa Fe serves only Chicago. Pennsylvania serves both the Chicago and St. Louis gateways, as does the Baltimore & Ohio, but this is not unique.<sup>18</sup> Nickel Plate and New York Central each serve the Chicago, Peoria and St. Louis gateways from the east, and Santa Fe's competitors, the Rock Island and Burlington, each serve all three from the west.

Many other important railroads serve one or more of these gateways. For example, Chicago is served by such major railroads as the Erie and Chesapeake & Ohio from the east and the Chicago & North Western and the Milwaukee from the west; and the same condition prevails at St. Louis (See Map, Appendix A).

Minneapolis says that if "control" of the Peoria gateway is allowed to pass into the hands of the "Pennsyl-

18. Pennsylvania also has a line to Peoria from the south, but that line is not a service route on east-west traffic (R. 567-70). When traffic is routed via Western and the point of interchange is not specified, Pennsylvania delivers it at Effner, thus giving Western its long haul (R. 573-74).

vania-Santa Fe combine" they would strangle Peoria gateway competition to the advantage of the other gateways. This suggestion is based on two assumptions: (1) that control of Western is control of the Peoria gateway; and (2) that the movement of traffic over Western's route is detrimental to the interests of Santa Fe and Pennsylvania. Both assumptions are false.

### **1. Control of Western is not control of the Peoria Gateway.**

In the first place, control of Western is not control of the Peoria gateway. There are a number of competitive east-west routes through Peoria which do not include Western. These are formed by such lines as the Minneapolis, Rock Island and Burlington on the west and the Nickel Plate, New York Central (through its subsidiary, the Peoria & Eastern), and the Chicago & Illinois Midland-Baltimore & Ohio route on the east (see Exhibit 6 to Santa Fe-Pennsylvania application, R. 149; Ex. H-11, R. 508, 1672; R. 844, 845; and Map, Appendix A). A substantial volume of traffic moves via such routes, cutting Western out entirely (Ex. H-128, pp. 13; R. 1590, 2002-04 and Ex. H-126; R. 1558, 1993).

Any attempt at suppression of Western would only divert Western's traffic to other available routes. Thus, as the Commission pointed out, unless Western continues its present service and solicitation policies, it will lose the traffic it interchanges with its other connections without any benefit to Santa Fe or Pennsylvania (R. 38-39). A number of large shippers, who use Western's route for service reasons, testified that if Western rendered poor service to its other connections, the traffic would go to other available routes which do not include either Santa Fe or Pennsylvania (R. 725-26, 727-28, 729-30, 771-73, 799, 845-46).



**2. The movement of traffic via Western's route through Peoria is beneficial, not detrimental, to Santa Fe and Pennsylvania.**

In the second place, the Commission found that Western's route was beneficial, not detrimental, to Pennsylvania and Santa Fe (R. 34) providing a "vital direct link" between them "essential to the type of through service which is becoming increasingly important not only to the shipping public but to the railroads as well" in meeting the competition "of other modes of transportation" (R. 45). The Commission also found that the plan of Santa Fe and Pennsylvania to place Lomax and Effner on a parity with Chicago from a solicitation standpoint would make additional traffic available for solicitation via Western's route (R. 34).

The basis for these findings is explained fully at pp. 34-37, *supra*, and need not be repeated here. Suffice it to say that unless Western's solicitors are left free to continue their present solicitation policies, Santa Fe would lose the opportunity of obtaining, through Western, a long haul on traffic which would otherwise move via St. Louis and might be lost to the Santa Fe entirely. Similarly, Pennsylvania, which with a half-interest in Western will fare as well or better on traffic moving via Effner rather than via Chicago, could well lose much of the traffic it now receives via Western at Effner from the Santa Fe, Burlington, Rock Island, and Minneapolis. This is just another aspect of the checks and balances inherent in the control of Western by an eastern and a western carrier (R. 46 and see pp. 28-29, *supra*).

Appellant refers to the exhibits showing the percentages of through revenues accruing as divisions to the railroads involved and says that Santa Fe would never be content with 52 per cent at Lomax when it could get 70 per cent by

hauling the traffic to Chicago (brief, p. 63). The example is not typical, involving as it does a haul from Grand Rapids, Michigan to Tulsa, Oklahoma, while 50 per cent of the interchange between Santa Fe and Western is trans-continental traffic where the differences between Chicago and Lomax divisions are must less (R. 475; Ex. II-10, pp. 2-3; R. 508, 1667-68). Even this example shows that the Santa Fe share via Lomax becomes 63 per cent when one-half of Western's division is added to reflect Santa Fe's proposed 50 per cent ownership of Western (Ex. II-34, p. 1; R. 1166, 1770).

The important point, however, is that "paper" comparisons such as these ignore the realities of transportation economics. A railroad cannot expect to get its longest haul on all the traffic it handles and cannot afford to neglect other routes which are sources of traffic for its line even though it may receive a shorter haul (R. 475-77). It is the total business the railroad handles that produces its gross revenues, not the maximum revenues on a particular car (R. 402-03, 483-84).<sup>19</sup> In this case Western's solicitation for traffic through the Peoria gateway, as noted above, assures the Santa Fe an opportunity to handle traffic which otherwise would move via St. Louis and which might be lost to it entirely.

Using the same Grand Rapids-Tulsa example, appellant compares Pennsylvania's 26 per cent division via Effner with its 50 per cent division via St. Louis. But with one-half of Western's division to reflect its proposed 50 per

19. These considerations explain the willingness of any railroad to accept less than its longest possible haul on much of the traffic it handles. Their significance was recognized by Mr. Nelson, appellant's vice president, when he testified that if appellant acquired Western it would not attempt to get the long haul to Effner on the large volume of traffic which it presently interchanges with the Nickel Plate at Peoria. Any attempt to disturb the profitable interchange with the Nickel Plate would be "pennywise and pound foolish" (R. 1188).

cent ownership in Western, Pennsylvania's share is shown as exceeding 37 per cent; and in several of the examples in the exhibit it is close to or equals the division via St. Louis (Ex. H-34; R. 1166, 1788-92, 1800, 1803). In almost all the examples shown, this basis produces a substantially greater percentage for Pennsylvania when routing is via Effner rather than Chicago.

Wholly aside from these considerations the checks and balances of Santa Fe-Pennsylvania ownership would prevent any restriction on the efforts of Western's solicitors to secure traffic for Western's route as against the St. Louis gateway. Any such restriction would destroy or greatly diminish Western's value to the Santa Fe. This the Santa Fe would never permit; and the contract under which it agreed to divide Western's ownership equally with Pennsylvania specifically provides that Western's solicitors "will be entirely free to solicit traffic in such manner as is best to serve the interests of Western" (R. 24).

Again using its Grand Rapids-Tulsa example, appellant suggests that Pennsylvania would favor the route through St. Louis and Kansas City via the Pennsylvania and its subsidiary, the Wabash. This would short haul the Santa Fe with a vengeance and it certainly would not permit any restriction on Western's solicitation against that route. Moreover, the record shows that even today with no interest in Western, Pennsylvania does not work with the Wabash against Western's route. On the contrary the Commission found that Pennsylvania favors Western's route via Effner (R. 43-44).

The Commission found that, although it is controlled by Pennsylvania, Wabash is independently operated by its own management (R. 26). The same finding was made in *Detroit, Toledo & Ironton R. Co. Control*, 275 I. C. C. 455.

458 (1950), and in *Illinois-Missouri Terminal Ry. Co. Purchase*, I. C. C. Finance Docket 18752 (1956).

The record in this case fully supports the finding that under Pennsylvania's control, Wabash has been independently operated by its own management (R. 526, 1278-79). It is shown by the fact that Pennsylvania and Wabash each pursue their own independent traffic policies based on their own self interest. This explains why the Pennsylvania-Wabash route via Logansport and Decatur has not developed as a significant competitor of the Pennsylvania-Western route via Effner. Use of the route via Logansport short-hauls both Wabash and Pennsylvania (R. 579). Wabash solicits for its long haul to Buffalo and as a result, interchanges more traffic with the Delaware, Lackawanna & Western at Buffalo than at all ten of its interchanges with Pennsylvania (R. 523). Conversely, Pennsylvania prefers to secure a haul to St. Louis, Chicago or Effner rather than interchange traffic with Wabash at Logansport (R. 579, 580, 528-29).

If further proof is needed to support the testimony that these are, in fact, the traffic policies of Pennsylvania and Wabash, it is found in the interchange data in the present record. In 1954, the interchange between Pennsylvania and Wabash at Logansport was 20,000 cars (R. 595), as compared with 56,414 cars interchanged with Western (R. 1641). And of the 20,000 cars interchanged with Wabash, almost 18,000 were eastbound cars received from Wabash, much of that traffic being from local points on Wabash's line which are not competitive with Western (R. 595). Even at St. Louis the interchange between the Pennsylvania and the Wabash amounted to only 7,910 cars (R. 603).

Nor has Pennsylvania used its control of the Wabash to restrain competition or injure its competitors. This was recognized by the Commission in *Detroit, Toledo & Ironton R. Co. Control*, *supra*, 275 I. C. C. at 490, when, after its

viewing the results of Pennsylvania's control of the Wabash, it found that such control had had "no substantial effect" on the interchange of traffic between the Wabash and its other connections.

Certainly the finding that Western's route is beneficial, not detrimental, to the Santa Fe and Pennsylvania, based as it is on the practical considerations affecting the routing of traffic and the relationships between railroads and shippers, was within the competence of the Commission. And it is buttressed by the undisputed finding that Santa Fe and Pennsylvania have demonstrated their economic interest in the development of Western by more than 30 years of cooperation in improving their connecting services (R. 21-22). In view of this long record of cooperation and the added incentive provided by their investment in Western, it is only common sense to conclude that the future of Western under their joint control will be one of continued growth and development. The shippers who are using Western's route today because of its superior service and who, therefore, have a very real interest in its future are convinced of this (R. 46). It defies common sense to assert—as does appellant—that having spent thirty years in helping to build up Western to its present position, Santa Fe and Pennsylvania are now seeking control in order to suppress it.

Minneapolis cites *United States v. Southern Pacific Co.*, 259 U. S. 214 (1922), as a decision in which this Court condemned "the very evils" said to be present here (brief, p. 62). But the history of that case only serves to illustrate the fact that the Commission is not bound by the standards of the antitrust laws in proceedings under Section 5 (2) of the Interstate Commerce Act. In that case this Court held that the Southern Pacific with its route from California via New Orleans to the east violated the antitrust laws when it acquired control of the Central

Pacific with its competing route from California via the Ogden gateway. Shortly thereafter, the acquisition was authorized by the Interstate Commerce Commission under the recently enacted Section 5 and the Commission's action was sustained in *United States v. Southern Pacific Co.*, 290 Fed. 433, 450 (D. Utah, 1923). Minneapolis refers to a statement in the earlier opinion of the Supreme Court that Southern Pacific would prefer its long haul via New Orleans to the detriment of the Ogden gateway. The vigor of the Ogden gateway after years of Southern Pacific control of the Central Pacific indicates that this fear was unjustified.

Minneapolis says the Commission has deviated from standards applied in previous cases, but the cases cited do not support this charge. *I. C. C. v. Baltimore & O. R. R.*, 152 I. C. C. 721 (1929), did not involve an "application" for approval of a "proposed acquisition" as Minneapolis asserts (brief, p. 21). It was a proceeding under the Clayton Act. The Commission expressly pointed out that approval under Section 5 (2) had neither been given nor sought and Commissioner Eastman, in a concurring opinion, pointed out that it was conceivable that the acquisition there involved might finally be approved in a proceeding under Section 5 (152 I. C. C. at 723 and 739). Moreover, that case involved direct competition of parallel lines between common points, which is not present here.

*Chicago, B. & Q. R. Co. Control*, 271 I. C. C. 63 (1948), was in no way comparable. That case involved the rehabilitation of existing rail lines to provide a new route and the entrance of an additional western carrier, the Santa Fe, directly into St. Louis. And it was conceded that there would be a very substantial diversion of traffic from other St. Louis lines, several of which were in weakened financial condition.

As a matter of fact, the report in that case recognized that the Santa Fe, as a western line, could not afford to "favor any of its connections at St. Louis as against another in its solicitation of traffic or otherwise because of the possible retaliation from the other" (271 I. C. C. at 154). This fact and its converse—that an eastern line like the Pennsylvania cannot afford to favor one western line against another—provide the checks and balances to which the Commission referred in the present case.

The quotation (brief, p. 64) from the *Spokane International* case, 295 I. C. C. 425 (1956), reflects views similar to those expressed by the Commission in the present case in rejecting the request of certain other railroads for participation with Santa Fe and Pennsylvania in the control of Western (R. 45). If an analogy is to be drawn from that case, the Santa Fe and Pennsylvania can best be likened to the successful applicant there, the Union Pacific. Like them, the Union Pacific was a large carrier; it gave the Spokane a long haul on interchange traffic; it had cooperated with the Spokane for years in building up through traffic; it was the Spokane's most important interchange connection; and under its proposal relationships with other carriers would be protected because the Spokane would retain its identity as a separate railroad "exactly as it is today".

### **C. No Combination of Santa Fe and Pennsylvania Is Involved in Their Joint Acquisition of Western.**

Finally, Minneapolis argues that the Commission ignored the overall effect on transportation of joining two "gigantic railroad empires" (brief, p. 67). Apparently this is a reference to the charge that acquisition of Western would increase their "monopolistic power" in their own service areas. Both Santa Fe and Pennsylvania are large rail-



roads, as the Commission's report shows (R. 25-26), but there is no evidence that either possesses monopolistic power in its own territory. Nor does this proceeding involve a combination or merger of Santa Fe and Pennsylvania. The lurid language, which is remarkably free from references to the record,<sup>20</sup> cannot obscure the fact that, despite their joint control of a 240 mile bridge railroad which already interchanges 70 per cent of its traffic with them, Santa Fe and Pennsylvania will still remain a western and an eastern railroad, respectively. As such, they cannot afford to work together to the detriment of their other connections to the west and to the east. The Commission so found (R. 46).

The District Court quite properly rejected the contention that the proposed acquisition would violate the anti-trust laws. As that court pointed out, the Commission "did give due consideration to the effect of the acquisition on competing carriers and the possible curtailment of competition and weighed such factors against the broad question of the public interest" (R. 101). It is not the function of the court to substitute its judgment for that of the Commission (R. 101). Resolving these considerations is "a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry"; and Congress left that task to the Commission. *McLean Trucking Co. v. United States*, *supra*, 321 U. S. at 87.

20. For example, the statement that "the greatest tonnage in the west is captive to Santa Fe" (brief, p. 67). This is not supported by the record and it is also untrue.

## IV.

**THERE HAS BEEN NO VIOLATION OF SECTION 10 OF THE CLAYTON ACT AND THAT SECTION IS NOT A BAR TO COMMISSION APPROVAL OF THE STOCK ACQUISITION BY SANTA FE AND PENNSYLVANIA PURSUANT TO SECTION 5 OF THE INTERSTATE COMMERCE ACT.**

Appellant contends that the "purchase" of Western's shares by Pennsylvania was a violation of Section 10 of the Clayton Act, 15 U. S. C. 20. Section 10 provides that no "common carrier engaged in commerce" may have "dealings in securities, supplies, or other articles of commerce" amounting to more than \$50,000 in any one year with any corporation with which it has directors in common, unless such dealings shall be pursuant to competitive bidding and with the bidder "whose bid is the most favorable to such common carrier".

The controlling interest in Western's stock—82 per cent—was held by the two trustees of the McNear estate, the Wilmington Trust Company and Guy Gladson. There are directors common to the Wilmington Trust and the Pennsylvania and appellant contends that Pennsylvania has had "dealings in securities" with the Wilmington Trust without receiving competitive bids. This, appellant says, was a direct violation of Section 10 which the Commission was powerless to "condone".

The pertinent facts are as follows: On April 15, 1955, Santa Fe and Pennsylvania obtained letter commitments from the McNear trustees for the sale to each of 26 per cent of Western's stock at \$100 per share, subject to any necessary Commission approval (R. 174-76). On May 25, after appellant had offered \$133 per share for the stock, these commitments were repudiated (R. 366). At the suggestion of Mr. Gladson, the individual trustee, after discussions with counsel for Mrs. McNear, the principal bene-

fiary, Santa Fe and Pennsylvania were advised that the stock would be sold to appellant unless Santa Fe or Pennsylvania agreed to purchase all of the stock "on a basis of equal to or better than" the offer of appellant (R. 1426-27). Pennsylvania declined; but Santa Fe on May 26 contracted to purchase all the stock held by the trustees at \$135 per share, subject to Commission approval (R. 1427-28, 150-54). It also contracted to purchase the shares of all the other holders of Western's stock (R. 367).

During the following month Santa Fe's president, Mr. Gurley, considered several possibilities ranging from sole ownership by Santa Fe to possible multiple ownership by a number of railroads (R. 367). Finally, on June 28, 1955, Santa Fe entered into a contract with Pennsylvania and Pennsylvania Company providing that the latter should acquire 50 per cent of the stock Santa Fe had contracted to purchase. This contract was also subject to Commission approval (R. 165-69).

Even if it is assumed that Section 10 of the Clayton Act is applicable to the situation here involved—we think it is not—the short answer to appellant's argument is found in Section 5(11) of the Interstate Commerce Act. Section 5(11) provides that the authority of the Commission under Section 5 is "exclusive and plenary" and that any persons participating in a transaction approved under Section 5 are "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law; Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved." The controlling consideration under Section 5 is the public interest in an adequate transportation system (*McLean Trucking Co. v. U. S.*, *supra*) and, having determined that the proposed acquisition of Western's stock by Santa Fe and Pennsylvania was in the public interest, the Commission properly concluded that the alleged violation

of Section 10 was no bar to its approval (R. 44). The District Court agreed (R. 98-99).

Appellant says Section 5(11) operates only as to the future and that the Commission is powerless to "condone" a past violation such as is alleged here (brief, pp. 57-58). What appellant fails to recognize is that the order here under attack operates only as to the future. It does not approve or ratify a past acquisition, although the Commission has the power to do so. *United States v. Southern Pacific Co.*, 290 Fed. 433, 450 (D. Utah, 1923). The contracts involved are expressly subject to the approval of the Commission. No stock has as yet been acquired by either Pennsylvania or Santa Fe and none will be unless and until the Commission's order is finally approved.

This action of the Commission was fully within its statutory authority and did not even purport to relieve the Pennsylvania of any past violations of law. If Pennsylvania had in fact violated Section 10, it would still be subject to prosecution and fine, the only sanction provided by that section. But there has been no violation either of the letter or purpose of Section 10.<sup>21</sup>

The purpose of Section 10 is to protect a carrier from paying too much or selling for too little when it deals in

21. As to the letter, Section 10 applies to "dealings in securities" by a "common carrier engaged in commerce". The term "dealings in" has been defined as "buying or selling" (25 C. J. S. 1040-41) and here no securities have been bought and none will be unless and until the Commission's order of approval becomes final. *NLRB v. Cabot Carbon Company*, 360 U. S. 203, 210-211 (1959), cited by appellant (brief, p. 55) is not in point. The term construed there was "dealing with", not "dealings in".

Moreover, as the District Court noted in passing, the prospective purchaser of 50 per cent of the stock is not Pennsylvania Railroad, but its subsidiary, Pennsylvania Company. The latter does not engage in railroad operations or operate carrier property (*Wabash R. Co. Control*, 247 I. C. C. 365, 366 and see R. 119, 120, 127-28) and therefore is not a "common carrier engaged in commerce".

supplies or securities with a seller or buyer with which it has an interlocking relationship. This is perfectly clear both from its language and its legislative history. Hence the provision that it must deal with "the bidder whose bid is most favorable to such common carrier". The legislative history, too, shows that Section 10 was enacted to protect the carrier from improvident dealings with a buyer or seller where there are directors in common and to prevent the enrichment of the latter at the expense of the carrier (51 Cong. Rec. 15943, 63rd Cong., 2d Sess., Sept. 30, 1914).

Appellant's argument, although it is not stated as clearly as it was below, necessarily assumes that Section 10 is intended to protect the interests of competing carriers who seek to purchase the same thing as the carrier to which Section 10 applies. But nowhere in the statute nor in its legislative history is there the slightest suggestion that its purpose is to require the carrier to bid competitively *against* other railroads when it is seeking to purchase supplies or securities. As the District Court pointed out, there is no language in Section 10 which "pertains to any competitive bidding by the railroad company" (R. 99). That would only serve to increase the price the carrier had to pay.

Although the District Court rested its decision of the Section 10 issue on the provisions of Section 5(11) of the Interstate Commerce Act, it noted in passing that the proposed purchase involved here was not the kind of transaction at which Section 10 is aimed. It pointed out that Wilmington Trust was not acting for itself but was functioning in a fiduciary capacity as a trustee in the interest of the beneficiaries of the trust. Thus the situation was not

one in which the interlocking directors could be enriched at the expense of the purchasing carrier (R. 98-99).<sup>22</sup>

The Commission, too, while resting its decision on Section 5(11), pointed out that the issue before it did not involve a purchase by the Pennsylvania from the Wilmington Trust. The Commission said:

" \* \* \* The Santa Fe is the only purchaser of the stock from the trustees and had no commitments to sell any of it to any other railroad. Before offering to sell a portion of the stock to Pennsylvania several other joint control possibilities were considered and rejected." (R. 44.)

Appellant challenges this finding, asserting that the Santa Fe purchase contract was part of a "joint venture" between Santa Fe and Pennsylvania (brief, p. 54), but the finding is fully supported by the record. Mr. Gurley, Santa Fe's president, testified that when Santa Fe contracted to purchase all the stock "there were no commitments on our part to sell any of the stock to any other railroad" (R. 367). He testified further that before agreeing to sell a portion of the stock to Pennsylvania, he considered several possibilities ranging from sole ownership by Santa Fe to possible multiple ownership, including Nickel Plate, Rock Island, Burlington and Minneapolis (R. 367). Conversations were had with officials of each of these roads, as well as with officials of Pennsylvania (R. 367).

<sup>22</sup> Appellant says the Commission should have found that the Pennsylvania enjoyed a preference in the negotiations as a result of the interlocking directorate (brief, p. 48). Such a finding would have no relevance to Section 10, but, in any event, it was the individual trustee, Mr. Gladson, who made the suggestion that the sale be made to Santa Fe or Pennsylvania if either would meet or better appellant's offer. This was made after discussion with counsel for the principal beneficiary (R. 1426-27) and reflects the desire of the beneficiaries to sell to Santa Fe and Pennsylvania, they could get as good a price, because of their natural interest in the future of Western and its employees (R. 831-33).

Mr. Gurley was cross-examined at length, but his testimony was not shaken (R. 379-80, 407-11). It was corroborated by copies of correspondence between Mr. Gurley and the president of the Rock Island which were introduced by the Rock Island, an adverse party (Ex. H-80-84; R. 1457, 1964-70) and by the testimony of appellant's chief executive (R. 1107-08). The Examiner who heard the testimony and observed the demeanor of the witness believed it. Under the circumstances, there would be no basis for overturning the Commission's finding even if the substantial evidence rule were not applicable.

Finally it should be pointed out that even if Section 10 were applicable to the parties here involved the Commission's findings fully justified the exercise of its "exclusive and plenary" authority under Section 5 to approve the acquisition and, thereby, relieve the parties from any restraints which might be imposed by Section 10 upon its consummation. There was no *fait accompli*; approval of which would undermine the administration of the statute, such as that which was condemned in *Central of Georgia Ry. Control*, 307 I. C. C. 39 (1958), cited by appellant (brief, p. 57). The proposed acquisition has been submitted to and approved by the Commission in advance of consummation. The Commission has found the proposed acquisition to be in the public interest. It has passed on the terms of the transaction and has expressly found the purchase price to be reasonable. In doing so it has also provided full protection against the evil which Section 10 of the Clayton Act was designed to prevent—exploitation of the purchasing carrier through payment of an excessive purchase price for the stock.



## V.

**APPELLANT WAS ACCORDED AN ADEQUATE JUDICIAL  
REVIEW BY THE DISTRICT COURT.**

Appellant's entire argument shows a fundamental misconception of the function of the courts in reviewing an exercise of the Commission's administrative discretion. It is directed largely to the merits of the issues presented before the Commission with scant reference to the Commission's findings or the evidence on which they are based. The court below did not abdicate its function as charged (brief, p. 72). It merely refused to substitute its judgment for that of the Commission on issues committed by law to the latter. Its action was consistent with a long line of decisions by this Court.<sup>23</sup>

Appellant's assertion (brief, p. 71) that it has not sought to invade "the province entrusted to the Commission" is belied by the very relief it seeks here. It has asked this Court to declare "as a matter of law" that "it is the duty of the Interstate Commerce Commission" to enter an order approving the Minneapolis application and denying that of Santa Fe and Pennsylvania (brief, p. 73). Appellant simply fails to recognize that the review of a Commission order is not a trial *de novo* of the issues before the Commission.

23. See, for example: *McLean Trucking Co. v. U. S.*, 321 U. S. 67 at 87-88 (1944); *U. S. v. Detroit Navigation Co.*, 326 U. S. 236, 241 (1945); *U. S. v. Pierce Auto Lines*, 327 U. S. 515, 535-36 (1946).

**CONCLUSION.**

We submit that the District Court carefully considered the questions raised by appellant, followed accepted standards of review and merely refused to substitute its judgment for that of the Commission on matters committed by law to the latter. Its judgment should, therefore, be affirmed.

Respectfully submitted,

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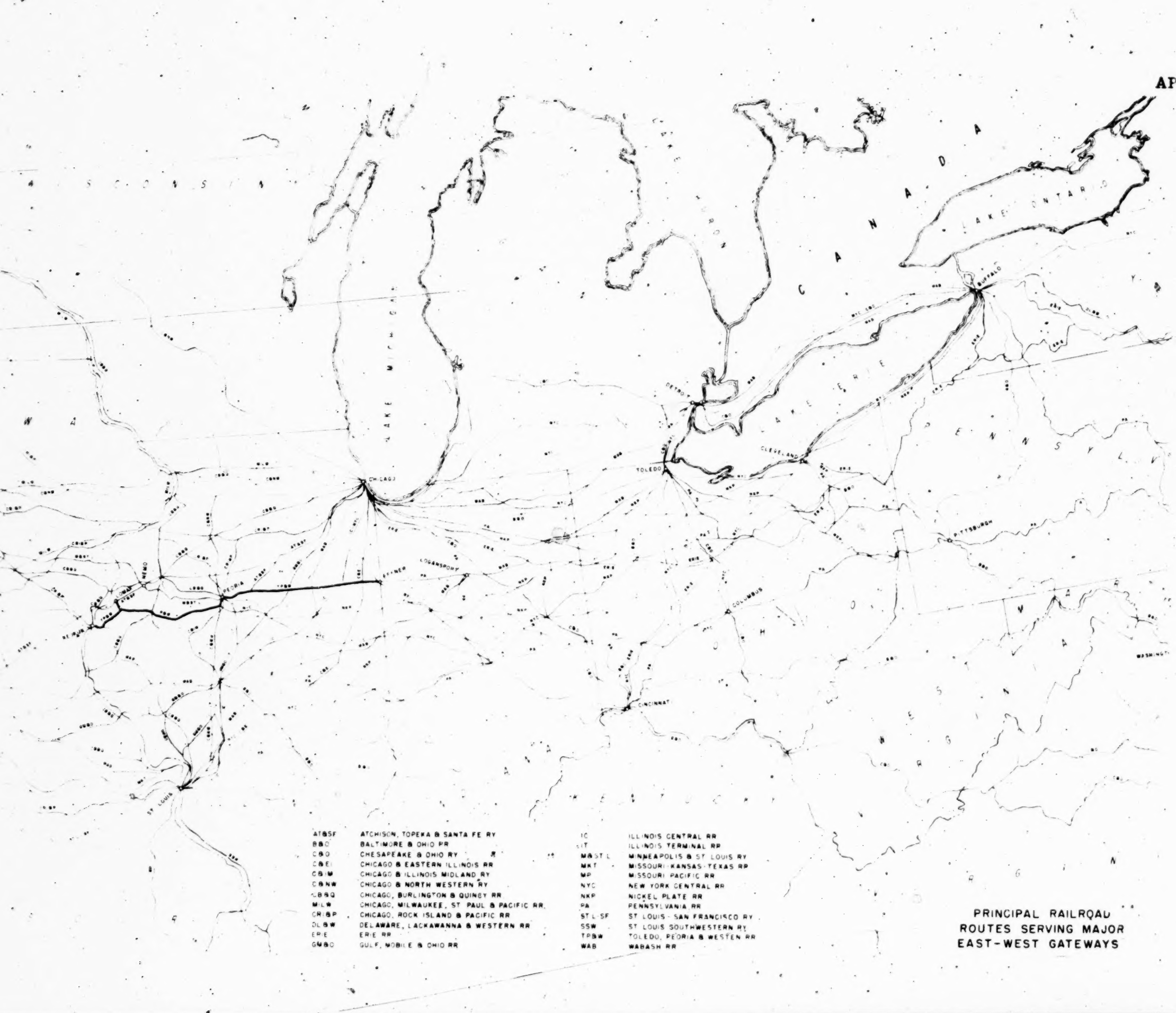
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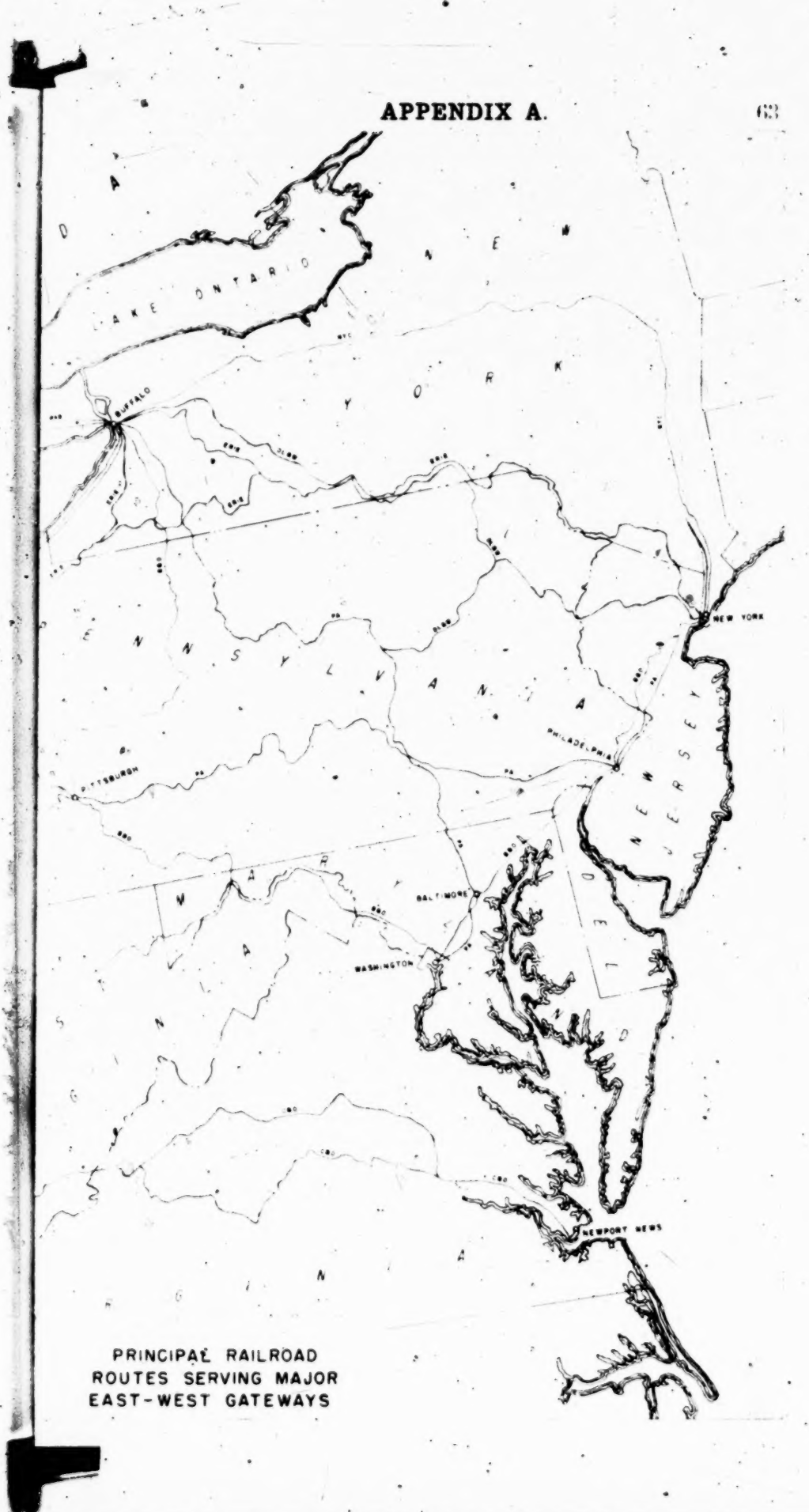
October 24, 1959.





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|-------|---|--------|-----------------------------|
| AT&SF | ATCHISON, TOPEKA & SANTA FE RY            | IC     | ILLINOIS CENTRAL RR         |
| BOO   | BALTIMORE & OHIO RR                       | IT     | ILLINOIS TERMINAL RR        |
| CBQ   | CHESAPEAKE & OHIO RY                      | M&STL  | MINNEAPOLIS & ST. LOUIS RY  |
| CEI   | CHICAGO & EASTERN ILLINOIS RR             | MKT    | MISSOURI-KANSAS-TEXAS RR    |
| CSM   | CHICAGO & ILLINOIS MIDLAND RY             | MP     | MISSOURI PACIFIC RR         |
| CB&W  | CHICAGO & NORTH WESTERN RY                | NYC    | NEW YORK CENTRAL RR         |
| CB&Q  | CHICAGO, BURLINGTON & QUINCY RR           | NKP    | NICKEL PLATE RR             |
| MILW  | CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RR | PA     | PENNSYLVANIA RR             |
| CR&P  | CHICAGO, ROCK ISLAND & PACIFIC RR         | STL SF | ST. LOUIS-SAN FRANCISCO RY  |
| DL&W  | DELAWARE, LACKAWANNA & WESTERN RR         | SSW    | ST. LOUIS SOUTHWESTERN RY   |
| ERI   | ERIE RR                                   | TP&W   | TOLEDO, PEORIA & WESTERN RR |
| GMB   | GULF, MOBILE & OHIO RR                    | WAB    | WARASH RR                   |

PRINCIPAL RAILROAD  
ROUTES SERVING MAJOR  
EAST-WEST GATEWAYS



PRINCIPAL RAILROAD  
ROUTES SERVING MAJOR  
EAST-WEST GATEWAYS

UNIT ON BEHALF OF THE  
MUNICIPALITIES AND SHIPPERS  
ALONG THE LINES OF TOLEDO  
PEORIA AND WESTERN RAILROAD  
COMPANY. APPELLED.



FILE COPY

Nos. 12, 27 and 28.

Office-Supreme Court, U.S.

FILED

OCT 26 1959.

JAMES R. BROWNING, Clerk

IN THE  
SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 1959.

THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY ET AL.,

*Appellants,*

VS.

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

**BRIEF ON BEHALF OF THE MUNICIPALITIES AND  
SHIPPERS ALONG THE LINES OF TOLEDO, PEORIA  
& WESTERN RAILROAD COMPANY, APPELLEES.**

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OCTOBER TERM, 1959.

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**STATEMENT.**

This brief is submitted jointly on behalf of the 18 municipalities, the 6 civic and business associations and

the Keokuk Bridge Commission of Keokuk, Iowa, which are referred to by appellant in its statement of the case as "certain other bodies" (Brief p. 13) which intervened in support of Santa Fe and Pennsylvania's control of Western.<sup>1</sup> Collectively, we represent virtually every municipal, civic, business and shipping interest along the lines of the Toledo, Peoria & Western Railroad Company.<sup>2</sup>

Because of appellant's inadequate characterization of the scope of the interests represented by our intervention and of the significance of our participation in the proceeding, it would appear necessary to define our interests and explain the basis for our participation. Our interest in this proceeding evolves out of the concern which we share for the economic and commercial welfare of the area in Central Illinois served by Western, of which the City of Peoria is the commercial and industrial center. Specifically, these interests include: (1) our interest in preserving and developing adequate transportation service in this

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1. These parties include: the City of Peoria, Illinois; the City of East Peoria, Illinois; the Peoria Association of Commerce; the City of Bushnell, Illinois; the Bushnell Chamber of Commerce; the City of Canton, Illinois; the Canton Chamber of Commerce; the City of LaHarpe, Illinois; the LaHarpe Golden Rule Club; the Village of Lomax, Illinois; the City of Keokuk, Iowa; the Keokuk Chamber of Commerce; the Keokuk Bridge Commission; the City of Warsaw, Illinois; the Warsaw Chamber of Commerce; the City of Forrest, Illinois; the City of Fairbury, Illinois; the City of Gудley, Illinois; the City of Gilman, Illinois; the City of Sheldon, Illinois; the City of Watseka, Illinois; the City of Eureka, Illinois; the Village of Secor, Illinois; the City of Washington, Illinois; and the City of Chenoa, Illinois. All of said appellees will hereinafter sometimes be referred to as "these intervening appellees."

2. Hereafter called Western. The Atchison, Topeka and Santa Fe Railway Company will be referred to herein as Santa Fe and the Pennsylvania Railroad Company will be referred to as Pennsylvania. Appellant will sometimes be referred to as Minneapolis.

area; (2) our interest in maintaining and extending the total transportation plant available in the Peoria area; (3) our interest in the welfare of the employees in the transportation industry in this area;<sup>3</sup> (4) our interest in the continued further industrial development of the Peoria area and in the area along the lines of Western, the achievement of which objective is so closely related to transportation, including (a) the location of new industry, (b) expansion of existing plant and (c) diversification of industrial lines; and (5) our broad interest in the economic stability of the area generally which is so vitally affected by a basic industry such as transportation.

We intervened in Interstate Commerce Commission Finance Docket 18991 in support of the application of Santa Fe and Pennsylvania for joint control of Western. We intervened in Interstate Commerce Commission Finance Docket 19086 in opposition to appellant's application for control of Western. We opposed at the hearing, upon brief, exceptions and oral argument before the Commission and on appeal to the District Court, appellant's proposal and the request of certain railroads for multiple ownership.<sup>4</sup>

We supported the application of Santa Fe and Pennsylvania for joint control of Western on the following grounds:

3. It should be noted that the Railway Labor Executives Association intervened in support of joint control by Santa Fe and Pennsylvania on the ground that the interests of Western's employees would be given full recognition under their proposal (R. 44).

4. Direct participation in control was sought by the New York, Chicago & St. Louis Railroad Company and the Chicago, Rock Island & Pacific Railroad Company; also, Chicago, Burlington & Quincy Railroad Company, and Wabash Railroad Company applied for participation in control in the event the Commission extended control to the two former railroads.

1. It will insure continued separate operation of Western under its present management with its executive offices and terminal facilities located in the Peoria area:

2. It will preserve intact all of the positive benefits accruing to these communities by the continued maintenance and preservation of Western's basic function as an important link in transcontinental traffic;

3. It will best assure the continued growth and development of Peoria as a railroad gateway;

4. It will best assure the continued growth and development of Western;

5. Such control and the benefits which will inevitably flow as a consequence of ownership by Santa Fe and Pennsylvania will provide the greatest single impetus which this area could receive to an expanding economy by the further industrial development of the Peoria area as well as the entire area served by Western.

We opposed appellant's application for control of Western on the following grounds:

1. Such control would forever foreclose to the Peoria area the realization of the positive benefits described above which would flow as a consequence of the joint control by Santa Fe and Pennsylvania and the continued development of Western as a major link in transcontinental rail traffic;

2. Such control admittedly would visit serious economic consequences upon these communities and particularly the Peoria area by a permanent loss of an annual payroll of over one and one quarter million dollars and a loss of employment affecting at least 256 families;

3. Such control would result in a substantial reduction of the total transportation plant and facilities.

ties available to the Peoria area by major abandonments of railroad yards, shops and offices;

4. Such control, with the curtailment of existing transportation plant and personnel and particularly the shift in orientation of Western's function as a major link in transcontinental traffic, would make the Peoria area and the area served by Western less attractive as a site for plant expansion and for the location of new industry;

5. Such control would inherently transform Western's line west of Peoria from a main line serving transcontinental traffic into a branch line of appellant's combined operation. This would result in serious economic consequences to the communities along this segment of Western's line which are wholly dependent upon Western for rail service.

The complete unanimity of opinion by those of us who are most vitally affected by a change in Western's control is a highly significant factor in this proceeding. Appellant cannot dismiss the importance of this fact by contending, as it has, that we are the victims of a "publicity and promotion campaign" (Brief p. 44). Too broad a range of interests, both geographic and economic, are involved herein. The Commission, in defining the concept of the public interest under Section 5(2) has stated that "consideration must be given to the public affected by the transaction and the effect of the proposal upon all parts of the public which would be so affected." *C., B. & Q. Railroad Control*, 271 I.C.C. 63, at p. 146 (1948); *Detroit Toledo & Ironton R. Co. Control*, 275 I.C.C. 455, 488 (1950). We constitute that part of the public which is most directly affected by the transaction. We submit that the Commission's order properly reflects our interests and should be sustained.

### SUMMARY OF ARGUMENT.

1. The Commission's decision awarding control of Western to Santa Fe and Pennsylvania is based upon adequate findings.

2. The findings upon which the Commission based its decision fall within the scope of the relevant legislative standards of Sec. 5 of the Interstate Commerce Act and the National Transportation Policy.

3. Appellant was accorded a fair hearing and a comparative consideration of its application for control of Western.

4. *An analysis of the criteria suggested by appellant for testing the issues relating to (1) adequacy of findings, (2) the relevance of the findings to the legislative standards, and (3) the question of whether appellant was accorded a comparative hearing, demonstrates that the District Court's decision should be affirmed.*

5. The findings are supported by substantial evidence.

6. Appellant's attack on the shippers and communities along the lines of Western is groundless and constitutes an abortive attempt to conceal the fact that its proposal for control of Western was opposed to the interests of that segment of the public which is most directly affected by this proceeding, the shippers, municipalities; and business interests located along the lines of Western.

7. South Dakota and Minnesota's interests in appellant's branch lines will not be affected by Santa Fe-Pennsylvania's control of Western.



## ARGUMENT.

### I.

#### **The Commission Accorded Appellant a Comparative Hearing; the Decision Is Based upon Adequate Findings and the Findings Are Consistent with the Statutory Standards.**

A reading of the Commission's report in its entirety indicates clearly that appellant was accorded a fair hearing and a comparative consideration of its application. Appellant ignores what the Commission found in its report and undertakes to attack the subjective mental process by which the decision was reached. Thus, ignoring the extended discussion of appellant's proposal contained in the report, appellant argues that the Commission reached its ultimate conclusion "at the outset" without a consideration of its proposal (Brief p. 19). Appellant argues, moreover, that the "criterion" adopted by the Commission was a "standard" of "separate and independent management" of Western (Brief p. 19). This "standard", however, can be found nowhere in the Commission's report either expressed as a finding or in its discussion of the issues.

Appellant's argument, based as it is upon some nebulous subjective mental processes of the Commission arrived at apart from the Commission's report, cannot be intelligently discussed. We can only deal with the Commission's approach to the proceeding as reflected by the objective standards of the findings contained in the report. By these objective standards, it is clear that (1) the Commission preliminarily defined its function to

include a comparative evaluation of both applications on the merits (R. 25), (2) the Commission did, in fact, discuss and evaluate the principal aspects of appellant's proposal on their merits (R. 30-37), and (3) the Commission made specific findings on the merits of appellant's proposal (R. 30-33).

The Commission initially undertook to define its function in this proceeding to include an evaluation of both applications in order to arrive at a decision as to which of the alternatives before it was most consistent with the public interest (R. 65). The Commission defined its function as follows: (1) to arrive at a standard of public interest; (2) in arriving at a standard of the public interest, to analyze each application in relation to the other, as well as to the other interests; and (3) then to determine which of the alternative plans for control most nearly approximates that standard.\*

Having defined its function to include a consideration of appellant's proposal, the Commission then proceeded to evaluate the significant aspects of that proposal. The report shows that, in arriving at a standard of the public interest, the benefits and detriments of both applications were considered. This is evident by the extended discussion of appellant's proposal which followed (R. 30-37). On the basis of this discussion of the proposal and the findings relating thereto, the Commission concluded that appellant's proposal was contrary to the public interest.

Appellant nevertheless argues that the Commission should have made "comparative" findings which "catalogued" the merits and demerits of the competing applications. Appellant contends that such findings are required in a comparative hearing proceeding and cites as authority, *Johnston Broadcasting Co. v. F.C.C.*, 175 F.2d 351 (D.C.

(Cir. 1949). The *Johnston* case, however, involved two mutually exclusive applications for the construction of a new broadcasting station. The court there said that the F.C.C. was required to make specific findings as to "every difference" between the applicants only after the minimum qualifications of both applicants had been established and the public interest was protected. The Commission in this proceeding was presented with two radically different proposals, both of which could not meet "minimum qualifications". Consequently, there was no point in the Commission's analysis at which the *Johnston* rule could have been applied.

As a practical matter, the complexity of the proceeding precluded detailed findings as to every difference between the Santa Fe-Pennsylvania plan and appellant's proposal. Any failure to make such detailed findings in no sense reflects a denial of a fair hearing or a comparative consideration of appellant's proposal.

Appellant suggests that certain criteria may be used for testing the issues relating to (1) the adequacy of the findings, (2) the compatibility of the findings with Sec. 5 and the National Transportation Policy and (3) the question of whether appellant was accorded a comparative hearing (Brief p. 23). We submit that each of these three issues should be resolved favorably to appellees *even under the criteria by which appellant seeks to have this court evaluate the Commission's report*. These tests include (1) efficiency and economies of operations, (2) improvement and expansion of service through the Peoria Gateway, (3) promotion of industrial development, (4) strengthening of the carriers in the interest of the national transportation system, (5) stability of employment and (6) promotion of competition.

An analysis of each of these criteria follows:

**Economies:** After reviewing appellant's evidence relative to its proposed economies, the Commission made a specific finding that most of the economies would be secured "at the expense of labor" (R. 32). This finding reflects that the interests of labor was one of the factors balanced by the Commission against the economies. The Commission is specifically required under Sec. 5(2)(c)(4) to give consideration to the interests of the "carrier employees affected". The economies which the Commission found would be realized as a consequence of Santa Fe-Pennsylvania's control of Western involved no similar conflict (R. 47).

A finding, isolating the factor of economies and weighing, the "comparative" dollar amounts of the economies which might be achieved under the two proposals, such as appellant contends is required in a comparative hearing, would have been inappropriate in this proceeding. The economies which appellant contends would be achieved under its control were based upon appellant's proposal to abolish Western as a separately operated carrier. This proposal conflicted not only with the interests of Western's employees, but the communities served by Western, local industries, shippers and other rail carriers. The economies which allegedly would be achieved under appellant's control of Western could not, therefore, logically be isolated from the context of appellant's proposal and "balanced" as an abstraction against the economies which would be achieved under Santa Fe-Pennsylvania's control of Western. Such balancing would have been illogical, moreover, for the additional reason that separate operation, by its very nature, does not lend itself to striking economies.

The economies were balanced realistically against the need for preserving Western's status as a separately operated carrier. The District Court recognized this and answered appellant's contention as follows:

"The plan which Minneapolis proposes is to abolish Western as an independent carrier, and that plan is strongly opposed, not only by the carriers and other defendants who have intervened herein, but also by many communities and industries in Illinois and Iowa, as well as the employees of Western. The removal of the offices of Western and its key personnel to Minneapolis is strongly protested. The large savings which allegedly were to follow upon an integration of Minneapolis and Western, as asserted by Minneapolis, was weighed and considered by the Commission. \* \* \* It may be noted that, of the \$1,770,-945 reduction in combined operating expense of Minneapolis and Western if integration took place, \$1,327,062 would result from the elimination of some 256 positions now occupied by employees of Western. *Whether such economies outweigh the alleged detriment to Western's employees, to its local industries and communities, and to other carriers, is also a matter which is clearly within the sound judgment of the Commission.*" (Emphasis supplied.) (R. 102).

Improvement of service via the Peoria Gateway: Appellant argues that the findings are deficient because "no" finding was made relative to the "improvement" and "expansion" of service via the Peoria Gateway and that it was denied a comparative hearing because the "merits and demerits" of the two proposals were not "catalogued" and "balanced" in relation to this standard. Appellant suggests that its proposal was superior "from the public viewpoint" in this regard because it proposed to establish through trains, accelerated schedules and new and direct interchanges with other railroads (Brief pp. 26-27).

Adequate findings were made with respect to the broad issue of the effect upon adequacy of rail service of the two proposals (R. 30, 32, 45). The ultimate basis for the Commission's decision rests, in fact, upon the "best use" of Western's transportation facilities in terms of the transportation service which it can best perform (R. 45). These findings are inherently related to adequacy of rail service via the Peoria Gateway (R. 36). Appellant ignores the broad service considerations underlying the decision and directs the court's attention instead to its proposal to establish new interchange points and to operate through trains via the Peoria Gateway which it argues was a test against which both proposals should have been compared.

This argument illustrates the inappropriateness of "comparative" findings as to any single aspect of either of the two proposals because of their radically different nature. Santa Fe-Pennsylvania's proposal for control of Western did not involve the institution of new interchange points or operating through trains via Western. The absence of such proposals did not, however, constitute an inherent "demerit" in its plan "from the public viewpoint". It simply reflected a different kind of utilization of Western's plant. The nature of the two proposals consequently did not lend itself to the kind of "comparative" findings as to any aspect of either of the plans as appellant argues should have been made. The Commission's view of the service factor in the proceeding was made abundantly clear. It concluded that ultimately the "improvement" and "expansion" of rail service via the Peoria Gateway lies in the future development of Western under its "present policies" (R. 45). This conclusion was based upon broad considerations having regard for the "strategic position" of Western serving the Peoria Gateway

as an alternative route (R. 21), its function as an overhead carrier (R. 21), the importance of its relationships with its 16 connecting lines (R. 21), and the significance of the preservation of these relationships and its policies to the railroad industry and to the public (R. 45). Appellant's plan for the "improvement" and "expansion" of service via Peoria, being part of its proposal for the absorption of Western, was inconsistent with the achievement of these objectives. The Commission so found (R. 30).

Appellant's argument illustrates why no single aspect of its proposal could have been isolated from the context of the plan of which it is a part and be dealt with as an abstraction in a comparative finding by the Commission. Such an approach would have been completely unrealistic. While the achievement of new service routes via Peoria by the establishment of new interchanges and through trains would appear superficially desirable, the Commission was faced with appellant's specific traffic program. The application of this program was found by the Commission to be "extremely harmful to other carriers" (R. 32), and would result in imperiling the traffic of other railroads (R. 32). In analyzing the effect of appellant's "unified operations" proposal and weighing the effect of these changes in Western's operations against their economic impact upon Western's connecting lines, the Commission was discharging the requirements of Sec. 5 and the National Transportation Policy which require the Commission to give consideration to "adequacy of transportation service".

These findings illustrate that new service proposals, such as are involved in the establishment of new interchange points and the operation of through trains, are not absolute objectives of either Sec. 5 or National Trans-



portation Policy, but are conditional objectives which must be weighed against their economic impact upon other carriers in a significantly broader application of the concept of "adequacy of transportation service". This is precisely what the Commission did.

Strengthening carriers in the interest of the national transportation system: Appellant, capitalizing on its status as a small carrier, argues that one of the determinative standards in the proceeding should have been the "strengthening" of a "weak carrier" and that "comparative" findings should have been made in accordance with this standard (Brief pp. 27-28). The Commission recognized that one of appellant's objectives in acquiring control of Western was to "enhance its financial stability" (R. 30). But the Commission found that appellant is "reasonably prosperous with a financial and physical picture that has been steadily improving over the past few years" (R. 28). The District Court noted in its decision that "The advantages to Minneapolis in adding Western to its railway system seems apparent. No doubt Minneapolis would be materially strengthened by its proposed integration with Western. But obviously the advantages to Minneapolis was only one of the considerations, and factors which the Commission had to weigh and evaluate." (R. 102).

This is exactly the point which appellant ignores. The Commission's function was broader than resolving the issues in terms of appellant's financial interests. Having found that appellant was a "substantial" railroad, a "comparative" finding resolving the issue of Western's control in terms of the relative financial needs of the competing applicants would have been completely inappropriate, and would not have provided a criterion which was relevant to the public interest.

The issues in the proceeding, moreover, were far more complex than appellant suggests. The Commission had to deal with the realities of appellant's proposal. It found that appellant's plan for securing additional traffic by its control of Western would be at the expense of other carriers connecting with Western (R. 32). Appellant's argument also ignores the fact that the ultimate rationale of the Commission's decision lies in this very area of strengthening the carriers in the interests of the national transportation system. The Commission's principal concern, however, was not with the financial interests of a single carrier but with the railroad industry as a whole. It found that, because of the national importance of Western as a "short line connection", and the unique transportation function which it performs on behalf of its 16 connecting lines, its present operation had to be retained in order to provide for the railroad industry the kind of transportation service which is essential "for the railroads adequately to compete with other modes of modern transportation" (R. 45).

Industrial development: There was no occasion for the Commission to make a "comparative" finding with respect to the relative interests of the competing applicants in industrial development along Western's lines. The economic interests of either applicant as owner of Western in this area are obvious. The Commission found that the promotion of industrial development along Western's lines was one of appellant's objectives as owner of Western (R. 30) and that under Santa Fe-Pennsylvania's control there also were "excellent prospects" for the location of new industry (R. 46). The latter finding is supported by the subsidiary finding reflecting our position regarding industrial development. The Commission found that "each of the city officials and representa-

tives of Chambers of Commerce of the communities served by Western recognized the advantages of Santa Fe-Pennsylvania ownership as an economic stimulus to the industrial development of their communities" (R. 47).

**Stability of employment:** Sec. 5(2)(c)(4) directs the Commission to give specific consideration to the "interest of the carrier employees affected". The interests of the carrier employees were represented by the Railway Labor Executives Association with participated in the proceedings before the Commission. The Commission found that the employees "unanimously" favored Santa Fe-Pennsylvania's proposal (R. 44). To argue, as appellant does, that the "carrier employees" interests would best be served by the elimination of 256 positions is little less than fantastic. Appellees submit that the Commission's decision accurately reflects the interests of the "carrier employees" and that a "comparative" finding based upon appellant's theory of "stability of employment" would have directly contravened the congressional intent expressed in the mandate of Sec. 5(2)(c)(4).

**Promotion of competition:** The Commission's findings regarding the competitive effects of the competing proposals particularly illustrate the fact that both proposals were accorded comparative consideration. The radically different objectives of the two proposals, however, necessarily required that the plans be analyzed independently of each other.

The Commission found that appellant's proposal contemplated the abandonment of Western's existing policy of neutrality with respect to the 15 other connecting carriers with which it presently cooperates (R. 30). Appellant's plan to increase its traffic by diverting the traffic of Western's connecting carriers was found to

have serious competitive consequences to other carriers (R. 32). The Commission found that the traffic of the Wabash and the other carriers which participated in the proceeding would be imperiled, or at least, diminished, and that the consequences of such diminution of traffic could result in line abandonments (R. 32). The effectuation of appellant's proposal, therefore, would ultimately have resulted in a serious curtailment of rail competition not only in the immediate area served by the combined Minneapolis-Western operation, but in a significantly broader area of the Middle West.

The competitive effects of Santa Fe-Pennsylvania's control of Western were given detailed consideration by the Commission. The economic self-interests of Santa Fe and Pennsylvania as joint owners was found to assure the continuance of Western's existing solicitation and service policies of working closely with each of its 16 connecting lines (R. 35). Before the Commission, appellant's argument with respect to the alleged restraint on competition resulting from Santa Fe-Pennsylvania control of Western took the form of specific claims of traffic diversion. These claims were analyzed in detail and were found to be groundless (R. 35-37). The Commission concluded that Santa Fe-Pennsylvania control of Western would not unduly curtail competition in connection with other rail carriers (R. 39).

The ultimate rationale of the Commission lies in Western's unique transportation function and in the need of preserving its function in order to promote more effective inter-mode competition in the field of transportation. The Commission found that the function which Western performs as a "vital link" to its connecting lines affords a basis for the railroad industry to provide the

"fast, strong and reliable" transportation service which is "necessary in order for the railroads adequately to compete with other modes of transportation" (R. 45). Control of Western by Santa Fe and Pennsylvania was thus found to have no adverse intra-mode competitive effect but would result in a substantial promotion of inter-mode competition in the transportation field.

## II.

### **The Findings Are Supported by Substantial Evidence.**

#### **1. Industrial Development.**

The interests represented by these intervening appellees, the communities and shippers along the lines of Western, have a very real interest in the promotion of industrial development in the area served by Western. We submit that the Commission's recognition of the benefits which would accrue to the economy of this area as a consequence of Santa Fe-Pennsylvania's control of Western through industrial development is fully supported by substantial evidence (R. 46).

This finding is based in part upon the evidence in the record establishing that the very fact of ownership by Santa Fe and Pennsylvania would itself provide a significant stimulus to industrial development in the communities served by Western. Such ownership by two large railroads, which connect at the eastern and western termini of Western would itself create an inducement both for the location of new industry as well as the expansion of existing plant (R. 639-40, 654, 658, 681, 750, 758-59, 790, 807-08, 820, 940, 950, 957, 965).

Appellant suggests that the Commission's finding is inconsistent with Santa Fe's and Pennsylvania's competitive interests in the area along their own lines (Brief p.

24). This ignores the fact that the finding is based upon evidence that, because of Santa Fe's late entry into Illinois and the Chicago area, it is lacking in industrial property in that area, and that Pennsylvania is short of industrial sites in Illinois (R. 485-86, 571, 582-83).

Appellant argues that the Commission's "confidence" is unwarranted because both carriers made it "crystal clear" that they would "bring" to Western only such industries as they were unable to locate on their own lines (Brief p. 44). This is not an accurate statement of the record or of the testimony of Messrs. Carpi and Duffy (R. 493-494, 583, 584). Mr. Gurley, then President of the Santa Fe, made it "crystal clear" that, as joint owner of Western, Santa Fe would treat the area served by Western on an equal basis with communities served by the Santa Fe with reference to the location of industries (R. 368).

The validity of the finding, moreover, is not dependent upon whether Santa Fe or Pennsylvania would "bring" industry to Western in preference to their own lines since it was established that merely the consulting services of Santa Fe and Pennsylvania's industrial development departments would be of material assistance to Western and to these intervening appellees (R. 639-40, 759, 964), and that their joint ownership of Western would itself create a basis for stimulating industrialization along Western's lines.

Directly related to this finding is the fact that Western's existing status as a bridge-line handling east-west traffic along its entire line "is the greatest single underwriting influence" for continued good service to the communities along Western's line and, particularly, along the segment of its line west of Peoria (R. 369). In 1927,



when Western's application was filed to connect with the Santa Fe at Lomax, it was pointed out that the proposed construction would aid in sustaining that part of the lines west of Peoria. *Construction by TP&W R.R.*, 124 I.C.C. 278, 279 (1927). This prediction has been fulfilled. The Santa Fe interchange at Lomax accounted for 78 per cent of the total traffic interchanged by Western with all its western connections for a twelve-month period ending June 30, 1955 (R. 1713). The retention of Western's existing function under Santa Fe-Pennsylvania's proposal, therefore, is particularly essential to the industrial development of the communities along its line west of Peoria.

Control of Western by appellant would, on the other hand seriously impair the service and would preclude the possible future industrial development of communities along Western's lines west of Peoria.<sup>5</sup> Some of these communities are entirely dependent upon Western for rail service. Appellant's main line between Nemo and Peoria parallels Western's line west of Peoria (Exhibit 6 attached to the application of the M. & St. L. and Finance Docket No. 19086-296). The traffic presently interchanged at Lomax with Western could, as was suggested by appellant's Chairman, "be consolidated" at Nemo (R. 386). Appellant's plan for diverting the traffic of other carriers to its own lines, moreover, did not involve a single interchange point on Western's lines west of Peoria (R. 1197-1200, 1178-84). Appellant's Freight Traffic Manager indicated furthermore that every line which presently interchanged with Western west of Peoria, except at

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5. These communities include the City of Canton, Illinois, the City of Bushnell, Illinois, the Village of Lomax, Illinois, the City of LaHarpe, Illinois, the City of Warsaw, Illinois, and the City of Keokuk, Iowa. Each of these municipalities and their respective Chambers of Commerce are parties to this brief.



Keokuk, could interchange such traffic with appellant on its present main line (R. 1158-60). This leaves little room for doubt as to the future of service via Western's line west of Peoria or the possibilities for industrial development along this line. Regardless of what appellant might argue concerning the future of Western's west end under its control, appellant's control would transform an existing main line into a branch line. Appellant's President was forced to admit this to be a fact (R. 1164). This would involve the transformation of a significant portion of a "vital link" in the national transportation system into a mere appendage of appellant's operations. This result, we submit, would have serious economic consequences to the communities and business interests which are presently served by Western's line west of Peoria.

Each of the municipalities, civic and business associations and shippers along Western's line represented by these intervening appellees offered extensive evidence which provided the basis for the Commission's finding that there are "excellent prospects" for the location of new industry under Santa Fe and Pennsylvania's control of Western. The unanimity of opinion of the organizations specifically concerned with the industrial development of these communities regarding this question cannot be disregarded. It should be noted, moreover, that the testimony of these witnesses was based in part upon the record of demonstrated cooperation of Santa Fe-Pennsylvania with both Western and these communities in the past.

## **2. Increased Car Supply.**

Another area in this proceeding in which we have a substantial interest lies in the increased availability of railroad cars to the shippers in the communities served by Western. The Commission found that under Santa

Fe-Pennsylvania's control the supply of freight cars available to Western would be materially increased (R. 47). This finding is closely related to the finding respecting industrial development along Western's lines since Western's inadequate car ownership creates a substantial deterrent to plant location along Western's lines.

Appellant ignores the specific proposals by which Santa Fe-Pennsylvania would, as joint owners, increase Western's car supply, and argues that the finding is not supported by the evidence because Santa Fe and Pennsylvania have experienced car shortages in their own operations (Brief pp. 43-44).

Appellant has experienced similar periods of car shortage (R. 1214). The problem of periodic periods of car shortages in the railroad industry is, however, national in scope and is wholly unrelated to this finding. The record on this point is clear. In the first place, it was established that Santa Fe and Pennsylvania would increase Western's car supply by bringing Western's car ownership to a proper level (R. 368-69). Secondly, as joint owners of Western, Santa Fe and Pennsylvania would make a greater number of their own cars available to Western and in a period of car shortage, Western's shippers would be treated on a parity with their own shippers in car distribution (R. 368-69). As joint owners of Western, Santa Fe and Pennsylvania would have a sufficient economic interest to justify such a program. These intervenors supported Santa Fe-Pennsylvania's proposal for this specific reason (R. 668, 689, 783-84, 917, 923). This testimony was based in part upon the demonstrated cooperation of Santa Fe-Pennsylvania with Western and its shippers in the matter of car supply in the past.

## III.

**Appellant's Attack on the Shippers and Communities  
Along the Lines of Western.**

Appellant has made broad and rather sweeping charges in its effort to discredit the unanimous public support accorded the Santa Fe-Pennsylvania proposal for control of Western (Brief pp. 44-45). Appellant's statements constitute neither a legitimate argument directed to the adequacy of the findings nor to the substantiality of the evidence as to specific findings. Appellant's statements are intended to minimize the significance of the participation in this proceeding of the 18 municipalities, the civic and business associations, and the shippers which are most directly and immediately affected by the outcome of this proceeding. Because our testimony underlies significant findings contained in the report, we cannot let these charges go unchallenged although they are not relevant to any of the issues with respect to the adequacy or substantiality of the findings.

The charge is made that the commercial and municipal interests represented by the intervenors herein were "produced" by the "free-spending" Santa Fe-Pennsylvania and "assembled" as part of a "promotional campaign". We are said to have been uninformed and not "remotely aware" of the issues in the proceeding. It is suggested that we do not really desire to maintain Western as a separate and independent operating carrier since we are not really opposed to the reduction of transportation facilities at Peoria, the removal of Western's offices to Minneapolis, the loss of at least 256 jobs in the area and the inability to realize the advantages occurring from Santa Fe-Pennsylvania control. We are said, on the other hand, to be interested "solely" in good service and appel-

lant is said to provide good or better service than Santa Fe-Pennsylvania. Thus the Commission should have confined the treatment of our testimony to its "economic substance," i. e., good service, instead of taking us at our word and assuming that we were supporting the continued separate and independent operation of Western and opposed to appellant. The significance of our testimony and the treatment accorded it by the Commission is thus conveniently written off as a "popularity contest", the import of which was completely misunderstood by the Commission (Brief pp. 44-45).

This rather fantastic argument only emphasizes the length to which appellant must go in an effort to discredit the significance of our participation in this proceeding.

No matter how carefully the record of our testimony is sifted in order to find a basis for discrediting it, the fact remains that not a single shipper, municipal or community interest which is directly and immediately affected by Western supported appellant's plan for control. This is not mere happenstance. It cannot be written off by a charge that these responsible municipal and business interests were the "victims" of Santa Fe and Pennsylvania's "promotion and publicity". Too broad a range of economic and public interests is represented by our participation. The absence of any public support speaks eloquently for the fact that appellant's proposal contravened the interests of that segment of the public interest which is most vitally and directly affected by the services of Western.

Without identifying specific findings, appellant argues that the Interstate Commerce Commission erred in not confining "the findings with respect to the shippers and local officials" to the "economic substance" of their testimony. The only findings made by the Commission with

respect to the shippers and communities along Western's lines reflect our position in this proceeding. We sought to maintain Western as a separate and independently-operated carrier (R. 31, 46). We sought to maintain Western's existing plant and facilities in the Peoria area (R. 47). We sought to retain Western's headquarters at Peoria in order to continue the present easy access to management (R. 47). We supported Santa Fe and Pennsylvania's proposal for control because of the specific advantages which would accrue to us by virtue of such ownership (R. 45). This was the "economic substance" of our testimony and this is precisely what the Commission found.

Appellant's proposal to eliminate at least 256 jobs in Peoria, to reduce the available transportation facilities involved in the abandonment of a classification yard, car repair shops and operating offices located in Peoria, and to move the offices to Minneapolis, obviously was unpopular. Consequently appellant is obliged to attack the Commission's action as reflecting the result of a "popularity contest" (Brief p. 45). But the basis for the "popularity" of Santa Fe-Pennsylvania's proposal lies in the fact that it would secure substantial economic advantages to these communities. Appellees submit that our participation in this proceeding would have been precisely the same even if we had not been the "victims" of an alleged "publicity and promotional campaign" to which appellant attributes our intervention (Brief p. 44). There is, however, no support in the record for this assertion and appellant's references to the record do not bear out the charge. The record references indicate that an attorney for the Santa Fe discussed its proposal with some of our witnesses, but it is also clear that the then Chairman of the Board of appellant's railroad was soliciting our support (R. 808, 815-16).

At the hearing before the Commission, counsel for the Santa Fe requested that we be heard after appellant had presented its proposal on the record (R. 351). Apparently realizing the extent to which appellant's plan, when its drastic character was completely revealed, would contravene our interests, counsel for appellant insisted that our witnesses be heard before appellant introduced its evidence (R. 351-52). Appellant now charges that our witnesses were uninformed and "not even remotely aware" of the considerations underlying its proposal (Brief pp. 44-45) and that not one of them expressed opposition to the elimination of "duplicate facilities" (Brief pp. 44-45), but were solely interested in "good service". If our opposition to appellant's proposal was not sufficiently articulate at the hearing, it was attributable entirely to appellant's procedural maneuvers at the commencement of the hearing. Our subsequent participation in this proceeding (after all the evidence was in) before Division 4, the Commission, the District Court and this Court indicates where our interests lie.

#### IV.

#### **Control of Western by Santa Fe-Pennsylvania Will Not Injure Appellant's Branch Lines in South Dakota and Minnesota.**

The participation in the proceedings of the States of South Dakota and Minnesota and their respective Public Utilities Commissions was predicted upon the fear that Santa Fe-Pennsylvania's control of Western would divert traffic from appellant's lines, thus resulting in the abandonment of appellant's branch lines in these states (Brief p. 28). The Commission, however, made an extensive analysis of appellant's claims of traffic diversion (R. 35-37). The Commission found that these claims were groundless.



Neither South Dakota nor Minnesota have attempted to deal with the Commission's detailed analysis or raised any question with respect to these findings in this appeal.

The issues discussed by South Dakota and Minnesota's briefs are manifestly no more than a reiteration of the arguments advanced by appellant.

### CONCLUSION.

Representing, as we do, the great bulk of the public interest of the middle west in this case, as opposed to the only expressed interest in reversing the lower court and the Commission (which was filed by the states of South Dakota and Minnesota and their respective public utility commissions), it can hardly be doubted that the public interest, insofar as the participants in this case are concerned, lies heavily in support of the Commission's order.

Concluding, it is earnestly submitted that the public interest to which the Interstate Commerce Commission is committed by virtue of the National Transportation Policy and the Interstate Commerce Act compels no other conclusion when reviewed in the light of the findings of the Commission in this case that the Commission in the exercise of its delegated authority in approving the application of the Santa Fe and the Pennsylvania Railroad for the acquisition of the Toledo, Peoria & Western Railroad Company has met all of the exacting requirements of the Interstate Commerce Act and the National Transportation Policy.

We therefore respectfully suggest, on the basis of the considerations outlined in this brief, that this honorable Court should—



(1) Sustain the holding of the lower court in this case, and

(2) Sustain the findings of the Interstate Commerce Commission and its order, which is the subject of this review.

Respectfully submitted,

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Nos. 12, 27, 28

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**In The  
Supreme Court of the United States**

OCTOBER TERM, 1959

**No. 12**

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

*Appellant,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.,

*Appellees.*

**No. 27**

STATE OF SOUTH DAKOTA AND PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA,

*Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.,

*Appellees.*

**No. 28**

STATE OF MINNESOTA AND MINNESOTA RAILROAD AND WARE-  
HOUSE COMMISSION,

*Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.,

*Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

**REPLY BRIEF OF APPELLANT, THE  
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY**

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT  
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**REPLY BRIEF OF APPELLANT, THE  
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY**

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The one subject that went unnoticed in the Commis-  
sion's report, and upon which the appellees have elected

to remain silent in its briefs, is Pennsylvania's admitted motive in entering the acquisition of Western, namely, to stifle competition. Pennsylvania had for years conceded the soundness of a Minneapolis-Western merger. (R. 977-8, 1022, 537-8) When it learned of the plan to add a third sector—the Monon—to produce a meaningful outer-outer belt line by-pass of Chicago, Pennsylvania proceeded with the acquisition of Western to forestall and permanently prevent that competition. (R. 1022-3, 539-40) And it did so with the aid of its interlocking directorate relationship with the seller, Wilmington Trust Company. How a transaction so oriented squares with the public interest the Commission did not say. The District Court, as explained in a footnote to the opinion, saw no purpose in exploring such motivations because the Commission had “no authority to direct the trustees to deal with Minneapolis rather than with the other interested purchasers.” (R. 97) And the whole subject, including the District Court's *non sequitur*, is simply ignored by all the appellees.

The deficiencies of the Commission report (and the briefs filed in its defense) reach deeper and further than this one item. The assumption is persistently made that Minneapolis contemplates the “disappearance” or “destruction” of the Western organization and abandonment of the policy of neutrality. (R. 30-1, U. S. Br. 24, 31, P.-S.F. Br. 8, 25, 29) There is not a shred of evidence to support any of these assumptions. The unification of the Minneapolis and Western solicitation and service organizations will enhance and fortify the existing policies of aggressive solicitation, impartiality with connections, and effective service. That is the announced purpose and the incontestable self-interest; both carriers have for years solicited the Peoria gateway to the exclusion

of all other gateways. The point is not whether the surviving operation of Western will be "independent", "autonomous", or "separate"—all of which are literary allusions. The real question is whether the service and solicitation policies will be aggressively pursued and impartially administered.

With respect to section 10 of the Clayton Act, the appellees' briefs reiterate the Commission's position that Pennsylvania made no purchase of Western stock from Wilmington Trust, but none attempts to explain how that comports with the record. Instead, they would read into the statute special limitations which the Congress did not write or, so far as the legislative history reveals, ever contemplate.

With respect to the national antitrust policies, the Commission's position, unexplained in its report, is finally disclosed. It regards the National Transportation Policy as a substitute for the national economic policy of free competition. In that frame of reference, it felt called upon to allude to the antitrust policy in terms only of individual traffic diversions rather than the over-all framework of free competition and did not seek the accommodation, to the extent possible, of both national policies.

### I.

#### **The Denial of a Comparative Hearing.**

Minneapolis presented a positive program for promotion of the Peoria gateway, economies through elimination of duplicate facilities and operations, added and improved service and strengthening the two small carriers. Pennsylvania and Santa Fe united on a negative program, admittedly undertaken to forestall competition from Minneapolis and Western; no economies or service im-

provements were involved and the owners would continue as Western's most powerful competitors. The Minneapolis application clearly advanced the National Transportation Policy "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation"; it conforms fully to the national antitrust policies. The Pennsylvania-Santa Fe application makes no contribution to the transportation policy and gravely offends the antitrust policy. Findings that would catalogue, evaluate and balance the comparative considerations (which could have yielded but one result) were not made. Instead the Commission adopted as the sole criterion "independent and separate operation" of Western, automatically ruling out any possibility of integration or economy. Now the Commission justifies its lack of comparative findings on the ground that it confronted "radically different proposals". Whether the standard to be achieved be determined in advance or at the conclusion of a composite balancing, there is no excuse for omitting findings of fact with respect to each application or the evaluation of the comparative advantages in each category.

While the appellees' briefs rely upon *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), that decision actually offers little comfort to their position. There the Commission did in fact examine and appraise, in comparison, each application in relation to each factor. The Commission found that both applicants were legally, technically and otherwise qualified and that both communities were equally in need of the programs proposed to be broadcast by each applicant. The one factor which carried the crucial weight was that Allentown had three local stations and that Easton had only one. Despite the difference in population, the Commission thought that the choice between locally originated programs was

decisive. Had like procedure been followed in this case, the Commission would have been compelled to grant the Minneapolis application and deny the other.

1. *The Illusion of Independence of Western.*

Both the Commission and the appellees gloss over the absence of comparative findings by loose references to the terms "independent", "separate" and "neutral". And now the Government brief (pp. 10, 23, 34) adds the term "autonomous". That Western's management could be independent of its owners is an illusion that not even the Pennsylvania-Santa Fe brief seriously espouses. Dispelling any notion that promises of separation and autonomy will insulate Western from effective control by its owners, were the Pennsylvania-Santa Fe conversations about using Western for their own advantage in empty refrigerator car routing, as noted in our original brief. (p. 22) In preparation for this hearing, the President of Pennsylvania found it advisable to warn his executives against altering existing relations to Pennsylvania's advantage—a measure wholly unnecessary were the normal inclination not in that direction. (Ex. H-14, R. 1693).

The assumed virtue of the separate operation appears to be two-fold. First, it is designed to continue active solicitation for Peoria gateway routing by Western's traffic solicitors, notwithstanding that the economic self-interest of the controlling carriers would remain in their longer hauls through Chicago and St. Louis. Our original brief exposed the parity hoax perpetrated upon the Commission and showed the unreality of expecting a subsidiary's solicitation force effectively to compete with the parents. *ICC v. Baltimore & O.R.R.*, 152 I.C.C. 721, 735-6 (1929) (Orig. Br. 20-22)

In terms of promotion of the Peoria gateway, the Commission had a choice. The solicitation force could be placed under the control of two carriers that had long been, and would continue as, active competitors and whose economic preferences lay in other gateways. Alternatively, Western's organization could be augmented with the Minneapolis traffic staff, both having long concentrated on bridge solicitation for the Peoria gateway to the exclusion of all others, and having no conflicting economic interest either to erase or to avoid.

Secondly, a "separate" Western was thought to provide assurance of neutrality with connecting carriers. The record shows that whether the exercise of control be patent or latent, self-interest provides the only truly effective guarantee of neutrality. In the court below, Pennsylvania-Santa Fe described any departure from neutrality by Western as "suicidal". There is nothing in the record or in good sense that renders that term less applicable if Minneapolis acquires Western. As the Traffic Vice President of Santa Fe put it, "any time it [Western] was guilty of preference, even with its owners under an independent operation, it wouldn't be long before the T.P.&W. would find very little cooperation with any of the other railroads that now interchange with it." (R. 503)

The Minneapolis acquisition was designed to be "... the closest possible thing to a continuation of the TP&W policy in its present form ..." (R. 1030) The Peoria gateway is the lifeline of Minneapolis. The Pennsylvania-Santa Fe brief (p. 28) concedes that "... railroad-servicing the east-west gateways cannot afford to favor one connection to the detriment of others." The \$12 million investment in Western compares to Minneapolis' capital stock of \$20 million. These add up to an overriding

economic incentive to operate, as the Minneapolis Chairman testified, "with an eye single to the best interest of the TP&W." (R. 1031)

We need look only to the conditions imposed by the Commission as an assurance of neutrality (R. 40-1) to see that these operating principles are unrelated to whether Western operates as a separate organization or in integrated collaboration with Minneapolis. These conditions require that existing routes, junctions and channels of trade be preserved and that the neutrality of handling traffic inbound, outbound and in overhead service be continued without discrimination.<sup>1</sup> Present relationship and service are to be continued without impeding the routing of traffic by captive industries. These conditions prescribe a way of life which the Pennsylvania-Santa Fe witnesses testified must be respected by any owner in order to avoid reprisals and retaliation from any carrier adversely affected. (R. 483-4, 546, 572)

2. *Preservation of Western's Solicitation and Service Policies by Minneapolis.*

Stripped of the confusion of labels, the heart of the Commission position is that the public interest will be served by retaining the established solicitation and serv-

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<sup>1</sup> The Government brief complains of our "belated" acceptance of these conditions. (p. 31) On the opening day of the hearing, Burlington, whose petition proposed the conditions, suggested a change. Counsel for Minneapolis announced its acceptance of the conditions, stating that prior to the hearing he had advised the Milwaukee of that acceptance. (R. 355, 454) The question arose again the next day, and Minneapolis reiterated its full acceptance of all the conditions. (R. 551) The neutrality conditions accord precisely with the incentive of Minneapolis "to carry on and improve the same type of aggressive solicitation and service that has been provided by the TP&W." (R. 1032)



ice policies of Western. Accepting this preconceived premise, it was incumbent upon the Commission to set out precisely the policies it proposed to preserve and to determine separately how each of these policies would fare under each of the competing applications. This the Commission was called upon to do, not by generalizations, not by recitals of asserted position, but by findings of fact predicated upon the evidence. And this is precisely what the Commission failed to do.

The policies which made Western successful were these:

First, aggressive solicitation of traffic in active competition with the primary gateways at Chicago and St. Louis and the minor gateways at Decatur, Kansas City and the like. This little carrier maintains 19 off-line agencies throughout the United States to promote that solicitation.

Second, efficient service bridging traffic on transcontinental routes between the east and the west. This involves efficiency in operation and effective utilization of equipment.

Third, the furnishing of full and prompt information to shippers with respect to traffic being handled. Here again the 19 off-line agencies provide facilities for that important purpose.

Fourth, the maintenance of cooperation with each of the 16 carriers with which Western connects. Primarily, this involves maintenance of service routes, facility of interchange and accommodation of schedules under a policy of impartial treatment for all connections.

These policies, supplemented by the active solicitation by Minneapolis which was dependent upon, and other roads that utilized, the Peoria gateway, enabled Western to build up its large traffic volume in defiance of the

"passive" opposition of its two largest connections, Pennsylvania and Santa Fe.<sup>2</sup> (R. 34)

3. *Preservation of Neutrality by Minneapolis.*

The Commission insisted that "The proposal of Minneapolis unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works." (R. 30) That Western and Minneapolis would integrate their operations and, to that extent the independence of both would be affected, is perfectly true. But with respect to neutrality, there is not one speck of evidence to support the Commission's statement. Indeed, it flies in the teeth of the sworn testimony and unqualified opinions of the

<sup>2</sup> Counsel make much of the Commission's finding that the success of Western "dates from the construction, in 1927, of its western connection with the Santa Fe at Lomax," (U.S. Br. 5; P.-S.F. Br. 4) The Court will note that finding reflects a time rather than a causal connection. The truth is that Western's success was attributable to the aggressive solicitation and service policies of McNear, who acquired the Western from the Receiver in 1927. At that time he said of his principal eastern and western connections that had owned the property for 33 years:

"... It was against the interest of the controlling companies—Pennsylvania-Burlington—to develop the property because it competed for traffic with their lines." Acquisition by T.P. & W. R.R., 124 I.C.C. 181, 187

(1927)

In the first year McNear jumped the Western carloads from 38,650 to 53,283, the Santa Fe contribution being less than 3,600 cars. The next year he increased the volume to just under 68,000 cars, of which the Santa Fe connection at Lomax accounted for 5,961. (R. 464; Ex. H-5, R. 1641) And even these Santa Fe carload figures are not net because, contemporaneously with the opening of the Lomax gateway, Western discontinued its joint operation from Lomax to Burlington for connection with the Burlington. (R. 381)

officers of the opposition. The evidence on the subject of neutrality is as follows:

1. Pennsylvania-Santa Fe witnesses testified that neutrality with connections is a highly sensitive aspect of railroad operation because the failure to respect neutrality invites reprisal and retaliation. Any semblance of favoritism is self-defeating. (R. 483-4, 546, 572) These economic forces would hardly be less operative under the Minneapolis regime than they would be for the colossi giving the warning.

2. Minneapolis proposed expanding and intensifying solicitation for the Peoria gateway. The number of off-line agencies soliciting Western traffic would be increased from 19 to 35. (R. 1185-7) Ninety percent of the revenue being derived from bridge traffic, such intensified solicitation would necessarily increase the volume of the connecting carriers. Far from deteriorating, the connections would be enhanced.

3. The Minneapolis program received the wholehearted endorsement of both the President of Pennsylvania, Western's largest connection, and the President of Western, who is credited with Western's progress in recent years. It was only when Pennsylvania's President felt the sting of meaningful competition from a proposed outer-outer belt line that he abandoned his position, held for years, that the Western and Minneapolis merger was a natural. (R. 532, 539, 1022-3, 977-8) It was only after Pennsylvania and Santa Fe made the second purchase contract that Western's President changed his allegiance. (R. 997) With their first-hand knowledge of both the operating realities of the proposed merger and the basic requirement of impartiality with connections, they supported the Minneapolis program—until they became adversaries in this litigation.

4. The improved service, proposed by Minneapolis, particularly when coupled with the intensified solicitation, offers new opportunities for traffic to most of Western's connections. If a car can move 15 or 18 hours—or even one hour—faster through integrated, accelerated schedules, the connections that deliver or receive that car will be the beneficiaries of heavier traffic.

5. Minneapolis, Santa Fe and Pennsylvania constitute three of Western's connections. Not one of the remaining 13 connections has appeared in this Court to challenge Minneapolis on the issue of neutrality. Were this a genuine threat, were there a danger that Minneapolis would adopt the self-defeating policy of favoritism, at least one of the adversely affected carriers would have appeared.

6. The Commission-imposed conditions are both acceptable to, and in harmony with the self-interest of, Minneapolis.

The opposition briefs assume that improved service is incompatible with neutrality. As the Commission's proposed conditions reveal, neutrality requires that existing service routes, connections and schedule accommodation be retained so that the opportunity for continuing existing service is not impaired for any connection. (R. 40-1) The evidence shows that Minneapolis intends to continue that program, and indeed the contemplation that Minneapolis would continue Western's high quality of service was conceded by Pennsylvania's Traffic Vice President. (R. 590) Neutrality does not guarantee to any connection that it will retain the same volume of business, that the shipper will not seek faster, better service elsewhere. The very essence of the transportation goal, be it rail, water, highway or air, is to give the shipper the finest, the fastest, the most convenient service. And that is

hardly incompatible with the public interest. But more than that, an examination of the improved and accelerated service proposed by Minneapolis establishes a complete absence of harm to any connections with Western.

First, it is proposed to provide integrated service between the Twin Cities and Effner, the eastern terminal of Western. How any connections could be injured by eliminating duplicate yard handling and the transfers of cars two or three times along the route, is difficult to see. Secondly, Minneapolis proposed to get coal traffic not now moving from its Middle Grove mines to the river port at Peoria by integrated service, avoiding a switching charge. Having in mind the intense competition in the coal industry and the significant portion of the coal selling price attributable to transportation expense, this proposal is a contribution to the miners and the mine owners in Middle Grove and adds a measure of stability to a vital, ailing national industry. Here again no connection could possibly be affected adversely.

Third, main line interchanges without intermediate switching carriers would save some 24 to 48 hours on Illinois Central interchanges, opening the opportunity for traffic from and to the south and southeast. (R. 1179) Improved interchanges were also proposed with the Gulf, Mobile & Ohio, Nickel Plate and New York Central, all calculated to bring new traffic through the Peoria gateway. (R. 1179-82) These steps would necessarily enhance the volume of traffic moving over Western, from and to its connections.

Fourth, new service routes would be opened through the C. & E. I. interchange at Watseka. This would "provide a faster freight service route" for traffic "now fun-

neled through the Chicago Gateway." (R. 1181) It would enable shippers from the northwest and, indeed, from any part of the west coast, to utilize Western's facilities to reach the south and southeast, and vice versa. Here, too, a new flow of traffic would be drawn into the gateway. Again, the connections could only be benefited, not harmed.

We do not deny that Minneapolis will intensify the competition with the Chicago and St. Louis gateways. Certainly it plans to divert traffic from these competing gateways and from other modes of transportation. (R. 1029) If promotion of the Peoria gateway serves the National Transportation Policy, then such diversions, obtained on the basis of better service, should be encouraged and not suppressed.

#### *4. The Commission's Use of Different Yardsticks.*

Not only did the Commission attribute to the Minneapolis program a destruction of neutrality, contradicted by all of the evidence, but the Commission invoked a special yardstick with which to strike at the so-called diversion of traffic. The improved, accelerated service and the new service routes, the Commission found, would be extremely harmful to other carriers. (R. 31-2) No finding of fact showing the nature or magnitude of such harm is provided. The only railroad mentioned is the Wabash, whose President thought "a large part" of about 6500 cars moving via Albia and Des Moines to or from Illinois or states east thereof would be "influenced" to Western.<sup>3</sup> (R. 1270-1). He could not say what portion

<sup>3</sup> The witness spoke of a large part of 35% of 21,000 cars moved in 1955. On cross-examination he admitted that this figure should be reduced by a 2500 car nonrecurring movement from Detroit. (R. 1292).

of this "large part" related to stations west of Bement, Illinois, the breakpoint for any possible diversion. The truth is that the Albia-Des Moines interchange to which the Wabash President referred is predominantly a north-south interchange which could not affect east-west traffic. (R. 1202) In any event, the Wabash is quite competent to supply specific data if genuine vulnerability existed or if the item had any real significance in its operations.

When the possibility of diversion of traffic by Pennsylvania-Santa Fe was considered, the Commission adopted a wholly different yardstick—and indeed a different tone:

"Of course, if service over the Western is improved under the control of the Santa Fe and the Pennsylvania, and traffic can be handled over it more economically and efficiently than over existing routes, there may be some diversion of traffic, but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers." (R. 34)

Thus the Commission employed the standard of jeopardy to maintenance of adequate transportation service to test diversion of traffic by Pennsylvania-Santa Fe, while holding that *any* diversion by Minneapolis is "extremely harmful." The employment of two wholly different criteria to judge the significance of traffic diversion by the competing applicants demonstrates the utter absence of a comparative hearing.

The Commission again tinkered with the standards in considering the diversion of Minneapolis traffic inherent in the Pennsylvania-Santa Fe program. Santa Fe's Traffic Vice President testified that Nemo would cease to be on a parity with Lomax "service wise and every other wise". (R. 496)\* This and other preferences would render \$7 million of Minneapolis traffic—more than



one-third of its total volume—vulnerable to diversion and would produce an almost certain loss of \$1.1 million in revenue. (R. 1027, 1104, 1112-8, 1254, 1356-7, 1410-1) While the Commission said that the "record does not disclose the basis of the percentages used" (R. 35), witness Swanson, in response to a Pennsylvania request, provided an analytical breakdown of all the traffic movements, the commodity and nature of which he had already described. (R. 1151/2, 1356-7) When he returned to the witness stand, the successful applicants elected not to cross-examine on that analytical breakdown. (R. 1611-12) Although Santa Fe's deliberate change in service was admitted and the imperiled traffic explored in detail, the Commission concluded that the Minneapolis traffic "does not move on a competitive service basis" and hence would not be vulnerable." (R. 36)

The idea that Minneapolis obtained the traffic through friendship rather than service came from the testimony of Coulter (President of Western) that Minneapolis service from Peoria to Nemo was almost a full day slower than Western's service to the Lomax terminal. (R. 1580-2) On cross, he admitted that the principal Minneapolis business received from Western at Peoria came "around 10 P.M. in the evening". (R. 1605) His principal testimony had reference to morning westward movement, which was admittedly light, but he did not know that Minneapolis' train No. 19 (departing Peoria at 1:15 A.M.) connects with the same Santa Fe train No. 59 at Nemo which receives the cars delivered at Lomax by Western's train No. 23 (departing Peoria at 1:00 A.M.). (R. 1606) The identity of these westward connections appears from the schedules in Santa Fe Exhibit H-121. (R. 1983-4) Recent schedule improvements have reduced the elapsed time for the traffic moving from Peoria to Kansas City to 17 hours 45 minutes on the Minneapolis-Santa Fe, compared with 19 hours 59 minutes on the Western-Santa Fe. The eastward traffic from Nemo connecting with Western at Peoria is delayed by lack of integrated schedules and switching (R. 1184), but the volume is not substantial. Of the entire Nemo-Peoria revenue, the eastward portion is less

Finally, any appraisal of added and improved service must be primarily in terms of public interest, not in terms of advantage for particular carriers. If the facility of movement of goods and wares in peace and military equipment in war can be expedited through the elimination of double and triple switching and multiple yard operations, then the public interest demands that such service be sustained unless, in the words of the Commission itself, such improvement would "jeopardize the maintenance of adequate transportation service by the objecting intervening carriers". (R. 34) Such effect from the Minneapolis program for improved service has never even been intimated by any party.

Had a comparative hearing been accorded, very little expertise judgment would have been required to weigh and compare the competing applications in terms of (1) improvement in transportation service, (2) promotion and development of the Peoria gateway, (3) economic incentive to preserve and enhance Western operations, (4) the maintenance of effective competition in the interest of shipper service and in keeping the antitrust policy, (5) the strengthening of carriers to perform their roles in the national transportation system, (6) provision of stability in employment without undue burden on individual employees, and (7) economies that will facilitate better and cheaper service to the public.

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(continued)

than 30%. (R. 1355-6) And of the Minneapolis deliveries at Peoria, less than 13% represents such delayed interchange with Western. (Ex. H 128, R. 2002) Other carriers cooperate to integrate their schedules with those of Minneapolis. (R. 1193, 1349) The comparison by the witness of 49 miles per hour speed on Western with 30 miles per hour on Minneapolis (R. 1579) turned out to be the maximum in the first instance and the average in the second. (R. 1597)

## II.

### **The Omission of Findings on Essential Issues and the Entry of Findings Contrary to Undisputed Record Proof.**

Appellees' briefs proceed on the assumption that when the Commission recites the position of a party on an issue, its fact finding function has been adequately discharged.

#### *1. Economics and Improved Service.*

The primary benefits sought in railroad mergers are economies through the elimination of duplicate facilities and integration of service. The Minneapolis proposal achieves both objectives for strengthening carriers and improving public service. This was no mere exercise in generalities. The evidence spells out the precise operations to be integrated, the duplications to be eliminated, the trains to be accelerated and the new service routes and connections to be added. (R. 1028, 1077, 1186, 1222-9, 1239-42; Ex. H-44, R. 1894-1924, 1380) The Pennsylvania-Santa Fe answer is that we ignore the "findings which reflect the Commission evaluation" of our contentions. (Br. 31) There is not a syllable in the Commission report which even approaches the dignity of a finding and none is cited by appellees. On economies, the Commission says only that "Minneapolis estimates". (R. 32) On improved service, the Commission says "Minneapolis contends" and "Minneapolis proposes to establish". (R. 31) Would the actual saving be \$1,770,945, as shown in the Minneapolis schedules and testimony, or would it be more or less? Are the accelerated service and the new service routes practical and will they advance the public interest? These are the queries which the Commission was called upon to answer in findings of fact

and on these matters nothing appears in the Commission report.

Without mentioning the public service benefits from the improved accelerated service, the Commission found that it would be "extremely harmful to other carriers". (R. 32) The Commission referred only to the vague Wabash generalization, unsupported by specific data (*supra*, pp. 13-14). Appellees would now bolster the Commission's findings with auxiliary findings of their own that the new service routes would divert traffic from Western's connections. (U. S. Br. 32-3; P.-S. F. Br. 29-30) The new service routes and accelerated service are designed to bring into the Peoria gateway additional traffic now moving through other terminals or by other modes of transportation (R. 1029); these must necessarily add to the volume of Western's connections. The Government errs in its assertion that Rock Island and Nickel Plate presented estimates of "potential losses from diversion of traffic under the Minneapolis plan." (U.S. Br. 23) The Rock Island figures mentioned reflect simply competitive traffic which could move today on either the Minneapolis or the Rock Island, and which the originating carrier can greatly influence. (R. 1551) The witness testified only that the Minneapolis was an aggressive competitor and that any business which is competitive could be lost. (R. 1542-5, 1550-1) The Nickel Plate testimony is in the same vein. (R. 1340-1)

Nor is there any evidentiary support for the fears expressed by appellees for the six other carriers. Hostile as the Commission was to the Minneapolis application, it did not even mention the Rock Island or the Nickel Plate or any carrier other than the Wabash in discussing the Minneapolis program. And none of the connecting carriers has been sufficiently concerned to intervene in

this Court. In the District Court, the only intervenor, Nickel Plate, did not raise any issue of Minneapolis diversion.

The other side of the coin is that the Santa Fe and Pennsylvania, with their massive originating volume, are in a truly powerful position to divert large tonnage. Most important is the tremendous long haul incentive for Pennsylvania and Santa Fe to divert existing Peoria gateway traffic to the more profitable St. Louis and Chicago gateways—a condition inherent in awarding Western to its most powerful competitors.

## *2. Economic Motivations.*

As noted, Pennsylvania's plan to acquire Western for the purpose of forestalling competition was, so far as disclosed in the report, not considered at all. Reference is made to the purpose of Pennsylvania and Santa Fe to "cement" their already close relationship with Western. (P.S.F. Br. 32) No mention is made of the fact that their connections with Western were in the nature of a shotgun marriage brought about by the service demands of shippers who were solicited by the dynamic McNear to utilize the short line bypassing Chicago. No account is taken of the fact that Santa Fe and Pennsylvania have "passively" opposed Western solicitation throughout the years. No consideration is given to the fact that Pennsylvania and Santa Fe are active, serious competitors of Western, with a primary interest in their long hauls to St. Louis and Chicago.

Counsel took pains to recall conversations of 1942 with reference to the acquisition of Western, but ignore (as did the Commission) the fact that up until the outer-outer belt line was proposed, Symes, President of Pennsylvania, kept urging a merger of Minneapolis and Western as a natural. Nor is there any reference to the

fact that Coulter, President of Western, administrator of the policies the Commission would preserve, similarly endorsed the Minneapolis-Western merger until he acquired new bosses under the contract of sale to Pennsylvania-Santa Fe.

We submit that an appraisal of economic motivations with these enormous blank spaces does not fulfill the Commission's responsibility in the public interest.

3. *Prior Ownership of Western by Pennsylvania-Burlington.*

Except for a reference to Western's "prolonged ownership by the Pennsylvania and the Burlington, which ended in receivership" (R. 21), the Commission's report makes no reference to that disastrous ownership experience of 33 years. It does not comment upon the fact, shown in its own records, that the receivership and the destruction of Western derived directly from the fact that it was against the interest of the controlling companies to develop the property because it competed with them for traffic. *Acquisition by T. P. & W. R.R.*, 124 I.C.C. 181 (1927).

Western's unhappy history imposed upon the Commission the duty of determining and weighing (a) the elements that led to the deterioration and receivership of Western, (b) the extent to which pertinent economic and operating conditions have undergone any material change, and (c) how, if at all, a repetition of the adverse results of ownership of Western by Pennsylvania in concert with a large western carrier could be avoided. That was never done. All that the Pennsylvania-Santa Fe brief can point to is the Commission's statement that much of Western's success dates from the construction of Western's connection at Lomax in 1927. As we have already indicated, this is a time and not a causal connection. The dramatic resurgence of Western's volume derives



from McNear's strong constructive solicitation and service. (*supra*, p. 9n.<sup>2</sup>) Nor does the Commission claim otherwise either through analysis of the figures or a direct finding. Even today only one-fourth of Pennsylvania's interchange with Western passes over the Santa Fe. (Ex. H-5, R. 1638) No amount of argument can erase the indelible fact that Western could not persuade shippers to use this strategic route until it was freed from control by its gigantic competitors. And in that sense, we fail to see the slightest difference between the history that Pennsylvania wrote before McNear and the one that the Commission would write now.

#### 4. *Purchase Price.*

The Commission approved the price as reasonable because it was established by "agreement between a willing seller and a willing buyer". (R. 42) Why the same willing seller and the same willing buyer agreed upon a price 35% lower just one month earlier gave no concern to the Commission. How it could discharge its obligations without inquiring into that startling fact, none of the briefs explains.

Both the Commission and the appellees would bolster the finding by generalizations with respect to the condition of the property and the operating record of Western which the Commission considered without specific evaluation. They see confirmation in the willingness of Minneapolis to pay the same price, but give no consideration to the fact that the Minneapolis program, because of economies, would yield earnings more than twice those available under the separate operation of Western. Lack of consideration of price-earnings data is attributed by Pennsylvania-Santa Fe to the absence of such data in the record. (P.-S.F. Br. 40) We would have thought that the agency regulating the railroads and collecting



their day-to-day earning and operating figures would have no difficulty correlating those earnings with the daily market quotations. It has not been too much for this Court to take judicial notice of market data, and we take it that the Commission should not deny itself similar information.

5. *Promotion of the Peoria gateway.*

The Commission found that Pennsylvania and Santa Fe intended to promote Western as a strong competitive force. Assurances were accepted in disregard of (a) the competition of their own traffic organizations, (b) their economic advantages in the long haul through competing gateways, and (c) their 30 years of passive resistance to Western solicitation. This vital conclusion was reached by the Commission on the basis of its findings that Santa Fe "intends to place Lomax on a parity with Chicago from a solicitation standpoint" and that under Pennsylvania solicitation "Effner and Chicago will be on a parity". (R. 34) The plain meaning of these findings is that, upon investing in Western, Santa Fe would solicit traffic equally for the Chicago and Lomax terminals and Pennsylvania (while continuing to favor St. Louis) would solicit equally for the Chicago and Effner interchange.

Pennsylvania's Traffic Vice President was asked, upon cross-examination, whether he intended to advise his "traffic solicitors that Effner is to be placed on a parity with Chicago and St. Louis with respect to the active solicitation of freight". His answer was, "Yes, sir." (R. 594) At an earlier point he had mentioned the proposed parity and said that Pennsylvania would "not work against Effner". (R. 571) Throughout the proceeding, Pennsylvania-Santa Fe officers spoke of parity in terms of solicitation, generally without revealing that they did not intend to solicit any traffic for Western. (R. 403, 405, 495, 582, 594) It remained for the final Pennsylvania-Santa Fe witness to make it clear, on cross-examination, that Pennsylvania would not solicit for Effner and Santa Fe would not solicit for Lomax, and that, in their lexicon, "parity" and "benevolent attitude" were synonymous. (R. 1600-1, 1609)

Our original brief showed that the word parity was delusive and misleading; that actually the successful applicants meant no equality of solicitation but in the words of their own witness, merely a "benevolent attitude". (R. 1609). Pennsylvania and Santa Fe now concede that they do not intend to solicit a pound of freight for interchange with Western either at Lomax or Effner, or anywhere else. They say, in effect, that the Commission understood that parity of solicitation meant neither parity nor solicitation.<sup>6</sup> And they arrive at that by the curious fact that the subject had been introduced earlier in the paragraph of the Commission report by a comment that under the new control, Western "would have an increased opportunity to secure traffic now moving via other gateways." (P.-S.F. Br. 34-5) Whatever special insight appellees may have, the report of the Commission which the courts are called upon to review makes it perfectly clear that the cornerstone of the Commission's fundamental conclusion that Pennsylvania-Santa Fe will promote the Peoria gateway is the finding of equality of solicitation for Western connections on the part of both carriers. The crumbling of that cornerstone, we respectfully suggest, withdraws the entire foundation for the promising structure erected by the Commission as a justification for its order.

*6. Testimony by Shippers and Local Officials.*

Our original brief pointed out that these witnesses were assembled as a part of a huge promotion, that they had no knowledge of the Minneapolis program and attempted no comparisons, that shippers were primarily interested in service, that all who had used Minneapolis applauded

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<sup>6</sup> The words of the Pennsylvania-Santa Fe brief (p. 34) are these:

"The Commission was not misled. It did not find that Santa Fe and Pennsylvania would solicit for Western."

its service and that, finally, the Commission should have been concerned with economic and public considerations, not a public opinion poll.

The one-sided expressions are excused by Pennsylvania-Santa Fe counsel by the argument that these witnesses appeared prior to the testimony of Minneapolis officials (Br. 40). That hardly excuses the failure to enlighten these witnesses or commends their uninformed opinions.

The concern, expressed by counsel for the appellees, for the future of service and industrial development on the segment of Western lying west of Peoria, has no basis in either evidence or findings. (U.S. Br. 11, 39, P.S.F. Br. 40-1) Studies made by the Minneapolis demonstrate the desirability of that property. (R. 1028-9, 1065) The density of its traffic is greater than that of a considerable portion of the Minneapolis line. The Commission found specifically that Minneapolis had no intention of abandoning that operation, and its findings do not intimate any possibility of deterioration in service. (R. 31)

Finally, the Pennsylvania-Santa Fe brief (p. 41) complains that the Minneapolis plans for accelerated schedules and new service routes would not benefit transcontinental shippers. A simple answer is that the Pennsylvania-Santa Fe proposes no improvement in service for any shippers. However, transcontinental shippers between the east and northwest must certainly benefit from the accelerated schedules. Those shipping to the west coast and the south and southeast would have new service routes with as much as two days' delay eliminated; these should certainly attract traffic movements to Western.

*Stability of Employment.*

The duty of the Commission to consider the effect of an acquisition upon employment is not satisfied by a mere reference to the number of positions eliminated by the abandonment of duplicate facilities and operations. The number of individuals who could be adversely affected and the extent to which the dislocation would be cushioned are factors which the Commission is required to consider. Nor may the long-range advantages of stability of employment be ignored. No explanation for the Commission's silence on these matters is suggested by the appellees.

The communities served by Western would be natural beneficiaries of the improved service, promotion and stability to be derived from uniting Western with the only other carrier that has for years promoted the Peoria gateway as basic to its very existence. Nor should there be overlooked the opportunities for commercial and industrial development, with added payrolls, which would be opened up by the consolidation of facilities. Considerable acreage from the yard and other facilities to be abandoned, a large office building and other property would become available for useful and productive utilization. (R. 1226)

The Commission knows full well that the employment aspect of carrier acquisition is a many faceted problem which cannot be answered simply by a mathematical computation of the number of unnecessary positions that will be eliminated. Indeed, the Washington Job Agreement and related formulae, from time to time invoked by the Commission, were established to meet the reality of that problem.

The factor of stability of employment as a consideration in a merger proceeding was ably described by the Commission itself in a recent decision:

*"The merger will afford more stabilized employment for employees of both roads. — In our opinion, the merger will be in the interest of employees of both roads, since in the last analysis railroad employment is directly dependent on volume of traffic handled. A stronger unified railroad would be in a much better position to develop new traffic than either Norfolk & Western or Virginian is separately. With heavier and more diversified traffic for the combined system, employment opportunities should be stabilized and increased." Norfolk & Western Railway Company — Merger — Virginian Railway Company, I.C.C. F.D. No. 20599, (October 8, 1959) Sheet 37.*

In that case the carriers made a special agreement that displaced employees would not be discharged but would move into vacancies which attrition would amply provide and the Commission invoked the Oklahoma job protection formula. The Minneapolis program was not materially dissimilar. Its Chairman testified that in a large internal reorganization vacancies from attrition were sufficient to absorb substantially all displaced employees and that the same result was expected here. (R. 1032-3) This program was fortified by the protection of the Washington Job Agreement. (R. 289) The possibility that the incumbents of the positions to be abolished would not all be absorbed in other positions is so remote and the number who can possibly be in jeopardy is so small that an absolute guarantee of employment would have cost less than the printing bills in this proceeding.

### III.

#### Section 10 of the Clayton Act.

The Commission held section 10 of the Clayton Act inapplicable, *first*, because the Commission has plenary authority under section 5(11) of the Interstate Commerce Act to render antitrust restraints inoperative, and *second*, because the purchase from Wilmington Trust Company had been made by the Santa Fe. (R. 44) Under *SEC v. Chencry Corp.*, 318 U. S. 80, 93-4 (1943), the validity of the decision "must be measured by what the Commission did, not by what it might have done."

The application to the Commission was for a joint acquisition by Santa Fe and Pennsylvania. The carriers had together negotiated and concluded the purchase agreements of April 15, 1955. Admittedly, Pennsylvania would have been a direct party to the agreement of the following month but for its insistence that the original sale agreements were valid. (R. 409, 458) Whether the Santa Fe discussion of participation with other railroads was or was not genuine, is not material. It did collaborate solely with its original partner, Pennsylvania, which always insisted upon the validity of its April 15th purchase contract, to enforce which a lawsuit is pending today. Both carriers then filed their joint application for the "joint acquisition of control of TP&W by Santa Fe and Pennsylvania Railroad". (R. 129)

Appellees insist that the "plain purpose of the section is to prevent a railroad from buying at too high a price" in an interlocking directorate situation. (U.S. Br. 63) Not a word of the statute is or can be cited to suggest such limited scope, nor is any support cited or to be found in the legislative history. The objectives outlined by the President and the Congress with respect to the original



section 9 of the bill (which became sections 8 and 10 of the Clayton Act) are these:

“As the President has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitled them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country.” (H. R. Rep. No. 627, p. 20, 63rd Cong. 2d Sess. (1914))

We might add that were section 10 rewritten in conformity with the Government's brief, the Commission should have been particularly scrupulous and exhaustive in its exploration of the purchase price issue. That inquiry could hardly exclude the unexplored 35 per cent increase in purchase price in 41 days, the disparity of the price with market appraisals of railroad shares, and the drastic difference in the income to the purchasers under the competing applications.

That the phrase “dealing in securities” is not limited to the carrier's own securities, as the Government suggests (U.S. Br. 63-4, n. 22), is affirmatively established by *La Re Missouri Pac. R.*, 13 F. Supp. 888 (E.D. Mo. 1935), as well as the legislative history. The initial House Bill did limit the restraint to the carrier's own securities. (H. R. Rep. No. 627, p. 3, 63rd Cong., 2d Sess. (1914)) The Senate bill, which in this respect the conference report adopted, changed the phrase to its present comprehensive terminology. (S. Rep. No. 698, p. 64, 63rd Cong., 2d Sess. (1914))

By the Clayton Act, the Congress was striking at the hard core of concentrated economic power. It established



clear-cut standards for corporate morality. The use of an interlocking directorate by the largest railroad in America to crush the competition of a tiny carrier falls squarely within the comprehensive spirit and the unqualified condemnation of the legislative enactment.

The Government brief concedes that the Commission may not ignore the policy embodied in section 10 of the Clayton Act but insists that "it is quite clear that the Commission did not do so". (U. S. Br. 67) While the Commission observed that it had powers of immunization under section 5(11) of the Interstate Commerce Act, it found section 10 inapplicable upon the ground that Santa Fe had made the purchase. (R. 44) It did not find it necessary to inquire into the section 10 policy or to cite considerations, if any there were, warranting special condonation. Indeed, the Commission did not even look beyond the nominal purchaser, to note the joint purchase initially made and the joint application for joint acquisition that initiated the proceeding.

The Government is apparently unwilling to defend the District Court's position that section 10 could be applied only where the seller was acting for its own beneficial interest and where the interlocking directors could be enriched at the expense of the carrier. (R. 98-9, P.S.F. Br. 58-9)

#### IV.

#### **Absence of Consideration of Antitrust Policy and its Accommodation to the National Transportation Policy.**

An accommodation of the national antitrust policy to the National Transportation Policy requires something much more fundamental and comprehensive than a mere inquiry into isolated diversions of traffic. It is not enough to say, as did the Commission (R. 39), that

the business of intervening railroads will not be unduly curtailed. Antitrust policy is concerned with whether mechanisms for monopolizing or stifling competition are being formulated, and that without regard to whether the immediate victims may be in the hearing room. It concerns the stake that the American people have in maintaining a free economy, unfettered by private cartels and combinations. It is in the full sweep of antitrust considerations that the Commission should have examined the antitrust problems before it.

We do not contend that the Commission may not properly sanction combinations that restrain competition in order to achieve significant public advantages in transportation service and facilities. Nor do we contend that the enormous disparity in size and power between the competing applicants entitles either to special consideration by the Commission. If the Commission is to proceed with an eye single to the public interest, it must take into account all significant considerations of transportation policy and antitrust policy, and may yield the latter only to the extent reasonably necessary to attain desirable transportation objectives for the public. We insist that the Commission cannot meet that obligation without taking into account the alternative possibilities.

The Commission's concept is that "Congress in dealing with recurrent railroad problems, has deliberately developed specific policies *in lieu of* the general national economic policy of free and unrestrained competition." (U. S. Br. 47) (emphasis supplied) This replacement notion is contradicted by *McLean Trucking Co. v. United States*, 321 U. S. 67, 84 n. 20, 85-7 (1944), where the Court makes it clear that (a) the antitrust laws remain applicable to the transportation industry, (b) their policy should be accommodated, to the extent possible, with

that of the Interstate Commerce Act, and (c) antitrust violations may be overridden "only where appropriate to further the national transportation policy," as established by adequate findings.<sup>4</sup> Thus is posed the issue before this Court.

Since the Commission did not see the flouting of anti-trust policy in the curtailment of gateway competition, a Pennsylvania's purpose permanently to foreclose competition, or in the enhanced competitive influence in the Pennsylvania-Santa Fe service areas, findings to warrant condonation were not provided. What transportation advantages in the public interest outweigh the curtailment of competition and the concentration of economic power has not been intimated either in the Commission's report or in the appellees' briefs. An appropriate criterion recently set by the Commission is "the affirmative improvement of transportation facilities" as expressed in terms of "more economical and efficient operations and service, and improved service to the public", certified by an assurance that "adequate competition would remain." *The Pittston Company—Control—Brinks, Incorporated*, 75 M.C.C. 345, 371-2 (1958). Of the applicants here, only Minneapolis could meet that test.

Even when the Commission dipped lightly into the problem, it utilized, as we have already demonstrated, different yardsticks. With respect to the Minneapolis application, any diversion by Minneapolis was deemed "extremely harmful" even though the facts were vague, the figures indefinite, and the amount involved was insignificant in the affected carrier's volume. On the other hand, jeopardy to 35% of the Minneapolis volume, with almost certain loss of 5%, was of no consequence. Nor was the Commission concerned with diversion by Pennsylvania-Santa Fe unless it would "jeopardize the maintenance of adequate transportation service by the

objecting intervening carriers." (R. 34) Thus, even in this limited aspect of the dynamic problem, there was not the slightest pretense of objectivity.

The subject of gateway competition was never considered by the Commission. It accepted the easy assurances of Pennsylvania-Santa Fe that competition with the Chicago and St. Louis gateways, which represents the very heart of the Western service, would not be relaxed, notwithstanding that such assurances are at war with the objective evidence:

1. Pennsylvania and Santa Fe have heretofore opposed Peoria gateway solicitation, preferring their long hauls respectively through Chicago and St. Louis.

2. Neither Pennsylvania nor Santa Fe proposes to change its solicitation policies. These will continue to favor the long hauls to St. Louis and Chicago, in keeping with their economic self-interest. The repeated references to parity serve only to conceal the fact that neither Pennsylvania nor Santa Fe intends to support traffic routing through the Peoria gateway. Solicitation will be left wholly to the present Western organization which cannot but be responsive to the preferences of the controlling carriers. *ICC v. Baltimore & O. R.R.*, 152 I.C.C. 724, 735-6 (1929).

3. For more than three decades Western was permitted to dry up under the control of Pennsylvania and Burlington, both of which appeared willing to sacrifice their investment in this property for the advantages of traffic moving through the Chicago and St. Louis gateways. The only change that has been cited is that, in the west, a Santa Fe connection has been substituted for that of Burlington. But the

Commission made no finding that either this or any other circumstance constituted a material or controlling difference between the current conditions and those under the prior regime.

4. The Minneapolis application provided the ready alternative in which there could be no doubt that Western's service would be promoted with intensified solicitation, and that genuine competition with the competing gateways would be effectively maintained.

The issue with respect to gateway competition, is challenged on the ground that "Control of Western is not control of the Peoria gateway." (U. S. Br. 56) Western is the primary Peoria link between the principal trans-continental roads of the east and of the west. It connects with all railroads entering Peoria and is the only bridge carrying traffic into and through Peoria, from both the eastern and the western territories. It has connections with 16 carriers that account directly for 40.8% of the broad track mileage in the United States. And they, in turn, connect with most of the remaining lines. Western is the key to the Peoria gateway because it permits trans-continental traffic to move between the east and the west from originations and for destinations in almost every part of the United States. Chicago is the great railroad terminal of the United States. Yet there is hardly a rough traffic movement passing through that terminal which cannot be by-passed through Peoria on the Western. The record discloses that interchanging well in excess of 100,000 cars of traffic per year. Western is far and away the primary carrier in the Peoria gateway. Its schedules, its service, its facilities, its location, give it a strategic importance to which this closely contested

proceeding is testimony. Were there satisfactory alternative facilities for the effective use of the Peoria gateway, the President of Pennsylvania would not feel called upon to reverse his policies of many years and move to destroy the grandiose plans for an outer-outer beltline (R. 1022). If Western did not occupy the strategic position of pre-eminence in the Peoria gateway, the Pennsylvania would not feel that its acquisition assured permanent protection against competition. (R. 1023)

There can be no doubt that Western is so vital a part of the Peoria gateway that its misuse is reached by the antitrust principles of the Sherman and Clayton Acts. Our national policy is not to wait until the economic injury has been accomplished, but to check the condemned evils at the outset. The possibility that the Peoria gateway will be completely destroyed is not necessary to move the Commission to preventive action. It is enough that the major, the dominant factor in that transcontinental bridge is being acquired by its largest competitors under circumstances calculated materially to restrain gateway competition.

Section 11 of the Clayton Act specifically charges the Commission with enforcement of section 7 of the Clayton Act in relation to carriers. (15 U.S.C. § 21) Section 7 is specifically designed to arrest in their incipency combinations, through the acquisition of stock or assets, the effect of which may be substantially to lessen competition. The very body charged with the enforcement of that section now insists that it need not effectively deal with that policy here.

The briefs of appellees repeat the Commission's theory of checks and balances to protect competing carriers. These were fully operative during the long Pennsylvania-Burlington ownership which ended in disaster. None of

the briefs suggests why the future of the theory should be any happier than its history. Santa Fe admits that the checks and balances will not operate in the crucial area of terminal routing and parity. (R. 425-6) Thus the discrimination against Minneapolis by ending the Lomax-Nemo parity and similar discrimination against others would not be reached. Finally, if the Commission's action must rely upon theoretical checks and balances, and hopes that the successful applicants will change their economic ways of life, the Commission had a duty to turn to the alternative application which required no such crutches.

Admittedly, we do not have a detailed analysis of the competitive effects of the Commission's order in the respective service areas of Santa Fe and Pennsylvania. The vacuum is not of our making. The successful applicants did not supply the necessary data, and the Commission showed no interest in exploring this sensitive area. We do know that the largest railroad in the east and the largest railroad in the west have joined to establish a transcontinental link. We know that at least the Pennsylvania thought it of sufficient importance to use its interlocking directorate relationship to crowd out the natural buyer. We know that the outer-outer belt line would permit direct utilization of the Peoria gateway by transcontinental carriers that can now reach it only through branch lines or interconnections.

It was not incumbent upon the objectors to establish a transgression of antitrust policy. What the Commission describes as the "heavy burden" of the applicants certainly includes, in the case of these giants, a showing that their program would not offend antitrust policy—at least not beyond the point necessary for appropriate transportation purposes.



CONCLUSION.

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Basically this proceeding concerns the proper application of legislative standards and respect for procedural principles established by statutes and the courts. There is a surprising lack of conflict in the evidence in factual matters. We have taken issue only with failure to make findings from undisputed facts or with the entry of findings contradicted by the evidence on both sides. Nor need expertise judgment be challenged to upset the Commission order.

Upon the record before the Commission it was its duty, as a matter of law, to reject the Pennsylvania-Santa Fe application and to approve the Minneapolis application.

Respectfully submitted.

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PROJECT FOR THE UNITED  
STATES AND THE 15 STATE  
COMMERCE COMMISSION

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Office-Supreme Court, U.S.

**FILED**

**OCT 26 1959**

**JAMES L. BROWNING, Clerk**

**Nos. 12, 27, 28**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1959**

**No. 12**

**THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, APPELLANT**

**v.**

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.**

**No. 27**

**STATE OF SOUTH DAKOTA AND PUBLIC UTILITIES COMMISSION OF  
THE STATE OF SOUTH DAKOTA, APPELLANTS**

**v.**

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.**

**No. 28**

**STATE OF MINNESOTA AND MINNESOTA RAILROAD AND WAREHOUSE  
COMMISSION, APPELLANTS**

**v.**

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, ET AL.**

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA**

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE  
COMMERCE COMMISSION**

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. 12

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,  
APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, ET AL.

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No. 27

STATE OF SOUTH DAKOTA AND PUBLIC UTILITIES COM-  
MISSION OF THE STATE OF SOUTH DAKOTA, APPEL-  
LANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, ET AL.

---

No. 28

STATE OF MINNESOTA AND MINNESOTA RAILROAD AND  
WAREHOUSE COMMISSION, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, ET AL.

---

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA

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BRIEF FOR THE UNITED STATES AND THE INTERSTATE  
COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the District Court (R. 91-105) is  
reported at 165 F. Supp. 893. The report of the In-

terstate Commerce Commission (Division 4) (R. 17-49) is reported at 295 I.C.C. 523.

#### **JURISDICTION**

The judgment of the District Court was entered on September 16, 1958 (R. 105), and the notices of appeal in Nos. 12, 27, and 28 were filed in the District Court on October 2, 1958 (R. 106-110), November 13, 1958 (R. 114-117), and November 12, 1958 (R. 111-114), respectively. Probable jurisdiction was noted as to all three ~~appeals~~ on March 9, 1959 (R. 2029). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

#### **STATUTES INVOLVED**

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding Section 1); Sections 5(2) and 5(11) of the Interstate Commerce Act, as amended (24 Stat. 380, as amended, 49 U.S.C. 5(2) and 5(11)); Section 1 of the Sherman Act, as amended (26 Stat. 209, as amended, 15 U.S.C. 1); Section 7 of the Clayton Act, as amended (38 Stat. 731, as amended, 15 U.S.C. 18); Section 10 of the Clayton Act, as amended (38 Stat. 734, 15 U.S.C. 20); and Sections 8(b) and 10(e) of the Administrative Procedure Act (60 Stat. 242, 243, 5 U.S.C. 1007(b) and 1009(e)) are set forth in the Appendix.

#### **QUESTIONS PRESENTED**

1. Whether, in authorizing the Atchison, Topeka & Santa Fe Railway and the Pennsylvania Railroad to acquire joint control of the Toledo, Peoria & Western, the Commission gave proper consideration to the com-

peting application of the Minneapolis & St. Louis Railway and made adequate findings, supported by evidence, in accordance with the standards of the Interstate Commerce Act.

2. Whether the Commission gave appropriate consideration to the competitive effects of the acquisition of control.

3. Whether Section 10 of the Clayton Act precludes the Commission from authorizing the acquisition of control in this case.

#### STATEMENT

These are direct appeals from the final judgment of a three-judge district court, dismissing the complaint of Minneapolis which sought to set aside orders of the Interstate Commerce Commission authorizing Santa Fe and Pennsylvania to acquire joint control of Western through ownership of equal amounts of Western's stock.

The following railroads are designated in this brief as indicated below:

Toledo, Peoria & Western Railroad Company	Western
The Atchison, Topeka & Santa Fe Railway Company	Santa Fe
The Pennsylvania Railroad Company	Pennsylvania
The Minneapolis & St. Louis Railway Company	Minneapolis
The New York, Chicago & St. Louis Railroad Company	Nickel Plate
Chicago, Rock Island & Pacific Railroad Company	Rock Island
Chicago, Burlington & Quincy Railroad Company	Burlington
Wabash Railroad Company	Wabash

*Description of Western.*—Approximately 240 miles in length, Western extends across Illinois from its eastern terminus at Effner on the Illinois-Indiana border through Peoria to its western termini at Lomax, Illinois, and Keokuk, Iowa. It has connections for the interchange of traffic with 16 railroads. It connects at Effner with the line of the Pennsylvania. On the west, it connects with the main line of the Santa Fe at Lomax and with the Rock Island and the Burlington at Keokuk. In the Peoria area, it connects with a number of carriers, including the Rock Island, the Burlington, and Minneapolis (from the west), the Nickel Plate, and the New York Central Railroad (from the east). Other principal connections are the New York Central at Sheldon (near Effner) and the Chicago, Milwaukee, St. Paul & Pacific Railroad at Webster.<sup>2</sup> Western's headquarters, shops, and yards are at East Peoria, just across the Illinois River from Peoria. (R. 20-21; Ex. H-4, R. 1615-1631.)

Taking full advantage of its strategic position as a short, direct bridge route between the east and the west bypassing the congested terminals of Chicago and St. Louis, Western has maintained a policy of

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<sup>2</sup> Santa Fe and Pennsylvania also connect with Western at Eureka and Peoria, respectively. However, their branch lines to these points are not service routes on through traffic and the interchange there is inconsequential (R. 516-517, 567-569; Exs. H-16, R. 1700, H-18, R. 1713-1714). For example, during the year ending June 30, 1955, Santa Fe and Western interchanged 31,671 cars at Lomax but only 307 at Eureka, and the Pennsylvania-Western interchange was 55,180 cars at Effner and 140 at Peoria (Ex. H-18, R. 1713).

strict neutrality between all of its connections. More than two-thirds of its total revenues are derived from overhead or bridge traffic. (R. 21-22.)

Much of Western's success as a bridge line dates from the construction, in 1927, of its western connection with the Santa Fe at Lomax. Since that time, the Santa Fe and the Pennsylvania have cooperated with Western in coordinating their schedules and services to provide a fully competitive service over Western's route. Consequently, Western exchanges more interline traffic with them than with all of its other connections combined, this interchange accounting for almost 70 percent of Western's gross revenues. The Burlington and the New York Central ranked third and fourth in volume of interchange with Western, followed by the Rock Island, Nickel Plate, and Minneapolis in that order. (R. 21-22.)

*The arrangements for purchase of Western's stock.*—82 per cent of Western's stock is held by two trustees of the estate of George P. McNear, principal owner of Western until his death in 1947. One of these trustees, Wilmington Trust Company, had four directors who were also directors of Pennsylvania and/or one or more of its affiliates or subsidiaries (Ex. H-73, R. 1944-1945).

Upon learning that the trustees desired to sell in order to diversify the holdings of the trust estate, Santa Fe and Pennsylvania entered into negotiations with the trustees for the purchase of the stock, as did Minneapolis. Subsequently, Santa Fe and Pennsylvania obtained letter agreements, dated April 15, 1955, from the trustees for the sale of 26 per cent of

the stock to each of the two railroads for \$100 per share, subject to the approval of the Interstate Commerce Commission (R. 174-176). However, on May 25, 1955, the trustees informed Santa Fe and Pennsylvania that they did not regard the letter agreements as binding and arranged to meet with the presidents of the two roads on May 27 (R. 366, 1026). In the meantime, Minneapolis had made further offers to purchase the stock, culminating in an offer to purchase the entire 82 per cent at \$133 per share—an offer which was to expire at 5:00 p.m., May 26 (R. 1018-1019, 1021, 1024-1026, 1426). On May 26, Santa Fe and Pennsylvania were advised by the trustees that the Minneapolis offer would be accepted unless they agreed to meet or better it (R. 366-367, 1426-1428). Thereupon, Santa Fe alone entered into an agreement with the trustees to purchase the stock for \$135 per share, subject to the Commission's approval (R. 150-154, 367, 1428-1429). Shortly thereafter, Santa Fe entered into agreements of like tenor with the remaining stockholders of Western (R. 154-160). After considering various joint control possibilities, as well as the possibility of proceeding alone (R. 367-368; Exs. H-80, H-81, H-82, H-83, R. 1964-1969), Santa Fe, on June 28, 1955, entered into an agreement with Pennsylvania Company (a wholly-owned subsidiary of Pennsylvania) to sell it 50 per cent of Western's stock, subject to Commission approval (R. 165-169).

*Proceedings before the Commission.*—On July 8, 1955, Santa Fe, Pennsylvania, and Pennsylvania Com-

pany filed with the Commission an application for its approval, under Section 5(2) of the Interstate Commerce Act, of joint acquisition by them of control of Western. Subsequently, Minneapolis also applied for authority to acquire control of Western through ownership of Western's entire capital stock.

Numerous parties intervened. The Nickel Plate and the Rock Island intervened to request inclusion in the acquisition of the stock of Western on an equal basis with the successful applicant or applicants. The Burlington and the Wabash did not object to the granting of the Santa Fe-Pennsylvania application, provided appropriate conditions were imposed for the maintenance of existing routes and traffic arrangements; but they requested that should any railroad other than Santa Fe and Pennsylvania be authorized to acquire an interest in the stock of Western, they be included in the transaction to the same extent as such other railroad. Various other railroads intervened to request the imposition of certain conditions. The States of Minnesota and South Dakota and their respective regulatory commissions intervened in support of the Minneapolis application, and the State of Illinois intervened in opposition to it. Various communities located along the line of Western, civic and business organizations, and shippers intervened in support of the Santa Fe-Pennsylvania application. The Railway Labor Executives Association intervened to protect the interests of carrier employees, and, on briefs and at oral argument, supported the Santa Fe-Pennsylvania application and opposed that of Minneapolis.



The two applications were consolidated for hearing. After the taking of extensive oral and documentary evidence, the hearing examiner issued a proposed report, recommending approval of the Santa Fe-Pennsylvania application and dismissal of the Minneapolis application. After exceptions and replies were filed and oral argument was heard, Division 4 of the Commission issued its report and order authorizing the acquisition of control of Western by Santa Fe and Pennsylvania and dismissing the application of Minneapolis. The Division found, subject to the conditions for the protection of railway employees and the maintenance of existing routes and channels of trade referred to in its report, that the terms and conditions of the proposed Santa Fe-Pennsylvania acquisition are "just and reasonable", and that the transaction "will be consistent with the public interest" (R. 49). The petition of Minneapolis for reconsideration was denied by the entire Commission.

*Proceedings in the District Court.*—On November 29, 1957, Minneapolis filed its complaint in the United States District Court for the District of Minnesota, and the court issued a temporary restraining order staying the effectiveness of the Commission's orders pending determination of the case on the merits. The States of Minnesota and South Dakota and their regulatory commissions intervened in support of Minneapolis.<sup>3</sup> Santa Fe, Pennsylvania, the State of Illi-

<sup>3</sup> Nickel Plate also intervened, joining Minneapolis in its effort to have the Commission's orders set aside, but taking the position that neither application should have been approved, and that multiple control (in which it participates) is the only form of control consistent with the public interest.

nois, and various communities and civic and business organizations intervened as defendants.

The district court, in an opinion which carefully considered and rejected appellants' principal contentions, unanimously sustained the validity of the Commission's orders (R. 91-105). The court discharged its temporary restraining order, but granted a 30-day stay and, after appellants had filed their notices of appeal, enjoined enforcement of the Commission's orders during the pendency of the appeals to this Court.

#### SUMMARY OF ARGUMENT

##### I

The National Transportation Policy and Section 5(2)(c) of the Interstate Commerce Act set forth broad criteria which the Commission must consider in determining whether a proposed railroad acquisition will serve the public interest. There necessarily remains for the Commission, as the expert agency chosen by Congress, the exacting task of applying the legislative policy to variant factual situations which are invariably complex. In this case, in passing upon competing applications for acquisition of Western—applications which embraced markedly different plans for the future operation of that road—the Commission, in order to make a meaningful choice, had to determine at the outset the kind of functional role which Western might best perform in the national and area transportation schemes. This determination, to be sure, might play a critical part in the eventual decision as to which applicant's ac-

quisition of Western would best serve the public interest. It does not follow, however, that such a determination is unfair to the applicant which contemplates a different role for Western.

Historically, Western had developed into a successful and efficient carrier serving as a link between a number of eastern and western trunk lines through the Peoria gateway. Its local management and its policy of neutrality between all of its connections were important elements in its success. When the death of Western's majority stockholder led to proposals for the transfer of its control to other railroad interests, the Commission determined that the public interest would best be served by maintaining Western's existing mode of operation to the greatest extent possible. This determination was certainly within its sound discretion.

As between the two competing proposals, there is no doubt that the Commission was amply justified in finding that the Santa Fe-Pennsylvania plan is far more consistent with this objective than Minneapolis'. Thus, the former proposed to continue Western as an autonomous carrier under its own local management, performing essentially the same bridging operation it had successfully carried on for the preceding 30 years; Minneapolis, on the other hand, planned to absorb Western within itself, without any separate Western management or solicitation force, and to initiate an intensive program to divert traffic from existing routing patterns to one more advantageous to Minneapolis. Moreover, contrary to

appellants' contentions, the economic interests of Santa Fe and Pennsylvania were not in conflict with their professed intentions. As lines joining the western and eastern extremities of Western, respectively, they had been largely instrumental in building up Western, had carried 70% of the interchange traffic between them, and had a continuing self-interest in maintaining a healthy neutral bridge carrier operating through the Peoria gateway.

The Commission's conclusion as to the advantages in granting the Santa Fe-Pennsylvania proposal is fortified by consideration of the other relevant factors in issue. A Santa Fe-Pennsylvania acquisition would have little, if any, adverse impact on the employees of the affected carriers, whereas Minneapolis' plans called for virtual elimination of the Western staff. The approved plan gives promise of encouraging considerable new industrial development along Western's route. Minneapolis, however, planned to cease all separate Western operations and would have had no incentive to promote industrial expansion on the important segment of Western's line between Peoria and the Iowa border, a segment which competes with its parallel line into Peoria. Contrary to Minneapolis' claim, the purchase price agreed to by the Santa Fe and Pennsylvania (which Minneapolis was willing to match) was a reasonable one, not burdening any of the parties with undue fixed charges. Although the economies of operation which Minneapolis claimed would result from its acquisition of Western were greater than those which would be realized by

its successful competitors, the significance of this factor is greatly offset by the consideration that those savings would be achieved largely by shifting Western's mode of operation from that favored by the overwhelming majority of carriers, shippers and other interested parties and found most desirable by the Commission.

## II

Since 1920, it has been plain that the general policy of encouraging competition, reflected in the antitrust laws, is not the test of public interest for purposes of railroad regulation. Congress has concluded that acquisitions or consolidations of railroad properties, which would otherwise violate the antitrust laws, may well serve the public interest by strengthening the transportation system. See Section 5(11) of the Interstate Commerce Act. This Court has accordingly held, *McLean Trucking Co. v. United States*, 321 U.S. 67, that the Commission, in passing upon a proposed acquisition under Section 5 of the Interstate Commerce Act, is not required to determine whether the acquisition would otherwise violate the Sherman or Clayton Acts or to make findings in terms of those Acts.

This is not to say that the Commission is to ignore the policy of the antitrust acts. Here, the Commission carefully analyzed the various claims as to the alleged adverse effect of a Santa Fe-Pennsylvania acquisition of Western upon "competition and diversion of traffic"; it concluded that "the benefits to be derived from the operation of Western under the

control of the Santa Fe and the Pennsylvania as proposed will be in furtherance of the over-all national transportation policy declared by the Congress, and its consummation will not unduly curtail competition in connection with the other carriers" (R. 39). The interests of the Santa Fe and Pennsylvania in the large interchange business they have developed over Western gives assurance, the Commission found, of their continued interest in the Peoria gateway and in maintaining Western's neutrality as between all carriers with which it connects. Other factors to which the Commission gave weight were (1) the checks and balances inherent in control equally divided between the largest connection carrier on the eastern extremity of Western and the largest connecting carrier on the west; (2) the evidence of shipper control of routings in a manner protective of all carriers; and (3) the nature of the agreement between Santa Fe and Pennsylvania for the operation of Western. Finally, the Commission's approval contained a series of express conditions designed to insure that existing routes and channels of trade will be maintained.

Minneapolis ignores the fact that the Santa Fe and Pennsylvania have strong economic interests in the continued development of the Peoria gateway and that other lines provide east-west routes through Peoria to which traffic might be diverted, to the detriment of the Santa Fe and Pennsylvania, if Western's service were allowed to deteriorate. The previous history of partial control of Western by Pennsylvania under entirely different circumstances does not indicate that

the present plan is undesirable. And, contrary to the contention of Minneapolis, the Commission's decision here is nowise inconsistent with the standards applied in other acquisition proceedings.

### III

The Pennsylvania and the Wilmington Trust Company, one of the trustees for the estate which held the majority of Western's stock, had a number of common directors. On this basis it is suggested that Section 10 of the Clayton Act is an obstacle to Commission approval of the Santa Fe-Pennsylvania acquisition.

However, the plain purpose of Section 10 is to prevent a railroad from buying at too high a price or selling at too low a price as the result of some common relationship between it and the seller or buyer. Here, if the price paid for Western's stock was high, this resulted from the competition for the stock between Minneapolis and Santa Fe-Pennsylvania and not because of directors which the Pennsylvania and Wilmington Trust Company had in common. Moreover, unlike ordinary purchases and sales by carriers, which are subject only to the criminal prohibitions of Section 10 of the Clayton Act, the proposed acquisition here was entered into subject to Commission approval; under Section 5(2) of the Interstate Commerce Act, the Commission had a responsibility, which it fully exercised, of determining that the proposed acquisition generally, and the purchase price and terms of sale specifically (See 49 U.S.C. 5(2) (c) and (d)), were consistent with the public interest.



Even if a technical violation of Section 10 had occurred, the Commission is expressly authorized to approve the acquisition notwithstanding such violation. Section 5(11) of the Interstate Commerce Act provides that the authority of the Commission over acquisitions is "exclusive and plenary" and that participating carriers are "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal \* \* \*." Although Commission approval of an acquisition might not bar criminal prosecution of a violation of Section 10 occurring during the purchase negotiations, both the language of Section 5(11) and relevant court decisions make it clear that the Commission may approve a Section 5 acquisition regardless of whether the acquisition would otherwise violate the antitrust laws. See *McLean Trucking Co. v. United States*, 321 U.S. 67.

#### ARGUMENT

#### I

THE COMMISSION'S DETERMINATION OF THE MERITS OF THE COMPETING APPLICATIONS WAS MADE IN CONFORMITY WITH THE STATUTORY STANDARDS AND IS SUPPORTED BY THE RECORD

In this case, the Commission was faced with two applications for authority to acquire control of Western; they embodied radically different proposals for the future operation of that road (R. 24-25, 30-31). The Commission expressly recognized its obligation to consider both applications under the governing public interest standard (R. 25). Its ultimate conclu-

sion (R. 49) in favor of the Santa Fe-Pennsylvania proposal is the result of a lengthy process in which it considered the views of all interested parties, determined what type of operation would best serve the public interest, and evaluated the acquisition proposals in the light of that determination and the various criteria set forth in the Act. The Commission also considered the competitive effects which might result.

Appellant Minneapolis, in Points I and II of its brief, urges that the Commission prejudged its case and deprived it of a fair hearing by determining that the public interest requires the continued separate and independent operation of Western in conformity with that road's established policies. This, it contends, amounted to advance endorsement of the proposal of Santa Fe and Pennsylvania and prevented a fair comparative consideration of the applications. Minneapolis also attacks the Commission's conclusion that the Santa Fe-Pennsylvania proposal would in fact achieve this goal (and that its own application would not) on the grounds that it is not supported by the evidence of record and could only have been reached by ignoring relevant considerations which the Commission was required to weigh. We shall show that none of these contentions has merit, and that this Court is, in effect, being asked on this appeal to renequivass and reweigh the findings and judgment of the Commission on matters that have been entrusted to its determination by Congress.

A. THE COMMISSION'S DETERMINATION THAT THE PUBLIC INTEREST WOULD BE SERVED BY MAINTAINING THE EXISTING POLICIES OF WESTERN WAS CONSISTENT WITH THE STATUTORY STANDARDS AND DID NOT DEPRIVE MINNEAPOLIS OF A FAIR HEARING

Congress and this Court have defined the general criteria which serve as guides to the Commission in determining whether a proposed acquisition of control is in the "public interest," as that term is used in Section 5(2). Thus, this Court has stated that the concept "public interest" "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities \* \* \*." *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25; *Texas v. United States*, 292 U.S. 522, 531; *McLean Trucking Co. v. United States*, 321 U.S. 67, 81. Section 5(2)(c) in terms requires the Commission to give weight to such considerations (among others) as the effects of the proposed transaction upon adequate transportation service to the public and upon the carrier employees affected. And the bearing of National Transportation Policy, 49 U.S.C. preceding Section 1, must, of course, be evaluated.

These criteria are not self-executing; comparative hearings are invariably complex and exacting. The

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\*Of course, as the Commission stated (R. 47), there was only one matured plan for acquisition agreed to by both the potential seller and would-be purchaser—that put forward by the Santa Fe and Pennsylvania—and even if the Commission had rejected this plan and authorized Minneapolis to purchase the stock, there was no assurance Western would agree to sell it. But, contrary to the contentions of the State of Minnesota in

Commission must translate the general criteria into concreteness in the factual context of the particular case. Cf. *Schaffer Transportation Co. v. United States*, 335 U.S. 83, 92. In doing so, it must give due consideration to all segments of the public affected by a proposed acquisition and to the nature of the railroad property to be acquired.<sup>5</sup> Thus, in the present case, the Commission carefully analyzed the situation of Western—its physical condition, its geographical location, its function in the national transportation system; the interests of the shippers who utilize Western; the interests of communities dependent upon Western; the interests of Western's employees; and the interests of the other railroads involved.

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its brief (pp. 9, 17), the Commission expressly found (R. 48) it to be within its power to authorize Minneapolis to acquire Western if its proposals proved superior. The Commission's conclusory statement that authorization of the Santa Fe-Pennsylvania acquisition mooted the question of anyone else's acquiring Western's stock is merely a recognition of the fact that the two proposals were mutually exclusive. Having found, after "carefully consider[ing] the evidence and arguments presented relating to both the applications before us", that on "the whole record" the application of the Santa Fe and Pennsylvania was to be granted (*ibid.*), the Commission obviously was not required to consider whether Minneapolis, standing alone, would have been qualified to acquire Western.

<sup>5</sup> The Commission stated at the outset of its Report (R. 25):

"\* \* \* We must weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitioners seeking such inclusion but also the other applicant and nonparticipating railroads as well. \* \* \* As a practical matter we, in such a proceeding as this, must arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it."

The Commission found that Western was developed as a sound railroad under its former owner, George McNear, and has continued to be successful under its present management (R. 21). It is in excellent physical and financial condition, has a good earnings and operating record, and enjoys able and progressive management (R. 42). Its policy "has been, and now is, to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight. Such policy emphasizes the strategic position of an overhead carrier\* through Peoria as an alternative route, bypassing the congested terminals of Chicago and St. Louis." (R. 21).

As the Commission stated, "It is universally conceded on the record that Western now is a well managed, independently operated railroad furnishing a valuable rail transportation service to the public" (R. 44). The Commission's appraisal of Western's role in the overall transportation picture is fully set forth in the following finding (R. 45):

\* \* \* Situated as it is between the Santa Fe at Lomax on the west and the Pennsylvania at Effner on the east, the Western receives its long haul and provides a vital direct link essential to the type of through service which is becoming increasingly important not only to the shipping public but to the railroads as

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\*Overhead or bridge traffic is traffic which originates and terminates on the lines of other carriers. The importance of bridge traffic to Western and its relative importance as a bridge line is shown by the undisputed fact that "At present, more than two-thirds of the total revenues of Western are derived from overhead or bridge traffic." (R. 22.)

well. Fast, strong, and reliable through transportation service is necessary in order for the railroads adequately to compete with the other modes of modern transportation, and Western, as a direct east-west line, supplies the short-line connection for providing this through service with a minimum of delay.<sup>7</sup>

In obvious recognition of the fact that Western is providing an extremely valuable service to shippers, to the communities along its line, and to its connecting railroads alike, the vast majority of those interested in the proceeding strongly favored the continuance of service by Western as a separate and independently operated carrier under its present local management. Thus, the Commission noted (R. 31):

Only the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of West-

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<sup>7</sup> The value of Western to the Nation's transportation system was demonstrated by the greatly increased volume of through traffic which moved over its line during World War II (Ex. II-5, R. 1644-1645). In an earlier proceeding (*Illinois-Missouri Terminal Ry. Co. Purchase*, 295 I.C.C. 805, not printed in full), the Commission described the important function which Western fulfills as follows (Finance Docket No. 18752, mimeographed report of April 2, 1956, sheets 43-44):

"\* \* \* Although only 231 miles long, the Toledo, Peoria & Western occupies a particularly important position in the Nation's transportation system as it forms a short, direct bridge route between the east and west which avoids the congested areas of Chicago and other major gateways. Modern equipment, dependable and convenient schedules, connections with all main lines, and complete icing and livestock facilities make the Toledo, Peoria & Western a valuable link for trans-continental shipments \* \* \*"

ern as a separate and independent operating carrier. All the other parties to these proceedings, including the railroad interveners, the communities served by the Western, and the shippers who appeared as witnesses, insist that the separate and independent operation of Western under its present local management is a public necessity. \* \* \*

And see the further statement at R. 46-47.

Based upon its evaluation of the record, the Commission concluded (R. 45) that "Public interest demands that the present policies of Western in all respects be continued", a conclusion which is overwhelmingly supported by the views expressed at the hearing and the above, unchallenged findings. Certainly, this determination conforms to the Congressional mandate that the development and preservation of a transportation system adequate to meet the needs of commerce, the Postal Service, and the national defense is the ultimate requirement of the public interest. National Transportation Policy, 49 U.S.C. preceding Section 1; *McLean Trucking Co. v. United States*, 321 U.S. 67, 82-83.

It is a basic misconception to suggest that the Commission should not have determined the optimum role which Western's operation may perform in the area transportation picture. Comparisons, if they are to be meaningful, must necessarily be made in a defined context. The merits of competing proposals and the qualifications of competing applicants must be viewed in terms of the concrete, practical objectives which are to be served.



To the extent that Minneapolis chose to gear its proposal to a scheme of operation that had undesirable features, that, to be sure, affected its chances of prevailing. Thus, its emphasis on the asserted efficiencies and savings to be achieved under its plan of consolidating Western's operations into its own necessarily lost weight in the face of the Commission's determination that the public interest would best be served by maintaining Western as a separate functional entity. In this respect, the situation is closely analogous to that presented in *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, where two competing applicants for radio stations proposed to serve different communities. This Court recognized that a preliminary judgment had to be made between the needs for service of the two areas, and that, in determining which of the two applicants could best meet this need, the award might well go to the party who, upon an abstract analysis of qualifications unrelated to the greater need, might have been found to be less qualified. Here, too, the Commission properly determined the basic transportation objectives and then evaluated the comparative qualifications of the applicants in the light of their ability to implement them.\*

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\* *Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351 (C.A.D.C.) which appellant Minneapolis states (Br. 23) "well describe[s]" the proper "technique" for comparing competing applicants, unlike *Allentown* and the instant case, was a proceeding where *both* applicants sought to perform the same function of a local radio station in a particular town, and the establishment of a governing norm was thus not a prerequisite of a meaningful comparison. Nor is the fair comparative hearing required of mutually exclusive applicants

B. THE COMMISSION PROPERLY FOUND THAT THE SANTA FE-PENNSYLVANIA PROPOSAL WOULD BEST INSURE MAINTENANCE OF SERVICE IN THE PUBLIC INTEREST

As the Commission pointed out (R. 25), the alternatives before it were the authorization of acquisition of control of Western by either Santa Fe-Pennsylvania or by the Minneapolis (or such authorization conditioned upon inclusion of other railroads who had expressed a desire to participate) or denial of both applications. Since Western was financially sound and performing a valuable public service, both applicants, as the Commission indicated, (*ibid.*) had a "most heavy" burden of proof in demonstrating that approval of their acquisition plans would be in the public interest. On the other hand, with the death of Mr. McNear, the controlling interest in Western had passed into the hands of an estate anxious to sell, and the Commission recognized that under such circumstances "it is in the public interest for control of a carrier to pass from non-carrier interests, which no longer desire it, to carrier auspices" (R. 45).

In evaluating the proposals of the two applicants, the Commission, of course, gave primary consideration to the extent to which their proposals in fact contemplated continuance of Western as an autonomous entity serving the Peoria gateway in accordance with Western's existing operating policies. It analyzed

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by *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, impaired by the prior establishment, in appropriate circumstances, of proper standards for determining what type of operation will in fact best serve the public interest.

the proposals of the two applicants in considerable detail and concluded that the one advanced by Santa Fe-Pennsylvania did in fact contemplate operation of the Western in the same manner as it had operated under independent ownership. On the other hand, the Minneapolis proposal "unequivocally contemplate[d] the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works" (R. 30)—a result which, the Commission concluded, "would be extremely harmful to other carriers" (R. 32). Minneapolis contends that these determinations are unrealistic and that the facts of record show that control by Minneapolis will best preserve Western as an integral part of the East-West railroad traffic pattern and enhance the development of the Peoria gateway as an alternative to Chicago or St. Louis. It is clear, however, as the court below expressly found (R. 105), that the findings of the Commission on these issues within its special statutory competence rest on substantial evidence and should not be disturbed.

(1) There is no dispute as to the nature of the Santa Fe-Pennsylvania proposal for the future operation of Western. Western will continue to be operated as a separate, independent carrier under local management; it will maintain its own solicitation forces and be free to solicit traffic in a manner which will best serve its own interests; and all existing routes and channels of trade via Western are to be kept open without discrimination as between connecting railroads (R. 24). The continued neutrality of West-

ern's operations was in fact incorporated into seven specific "conditions" which the two carriers agreed to accept as part of any order approving their application (R. 40). These the Commission incorporated into its authorization order as the binding conditions upon which its approval was premised (R. 50).

Minneapo's claims that none of the representations as to an independent or neutral operation of Western can be accepted at face value, and that, in light of the economic interests of the Santa Fe and Pennsylvania, the Commission had no alternative but to conclude that the real effect of their acquisition of Western would be to destroy or seriously hinder the "Peoria Gateway" and to promote the Chicago and St. Louis Gateway in which the primary economic interests of the Santa Fe and Pennsylvania are said to reside.

The alleged anti-competitive aspects of the joint control of Western by Santa Fe and Pennsylvania are discussed in detail in point II of this brief, *infra*, pp. 51-58. We do note at this point that the Commission gave appropriate consideration to the allegedly anti-competitive consequences of a Santa Fe-Pennsylvania acquisition of Western and found them to be minimal.

It is, of course, true that stock control of a corporation inherently involves control of its policy. It does not follow, however, that stock control of Western must be so exercised as to impair its separate and independent operation and policies of neutrality. Confronted with predictions of the same dire consequences in an earlier acquisition proceeding, the Commission noted that actual experience had proved otherwise.

pointing to the case of the Wabash under control of the Pennsylvania, *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 488-490, affirmed *sub. nom. New York, C. & St. L. R. Co. v. United States*, 95 F. Supp. 811 (N.D. Ohio). In a number of cases, the Commission has recognized the efficacy of separate operation of a controlled carrier under its own local management as a means of preserving existing traffic relationships with connecting lines and insuring continued neutrality in service (*Wabash R. Co. Control*, 247 I.C.C. 365, 370-371; *Wheeling & L.E. Ry. Co. Control*, 267 I.C.C. 163, 176; *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 490), and it has had occasion to require separate operation (*Chicago Junction Case*, 71 I.C.C. 631, 638-639; *Clinchfield R. Co. Lease*, 90 I.C.C. 112, 132-133).

The Commission was not required to presume that the Santa Fe-Pennsylvania proposal was not made in good faith. On the contrary, responsible officers of the two roads provided assurances in their testimony, upon which the Commission was entitled to rely, that Western would indeed be operated as proposed. Cf. *Chicago Junction Case*, *supra*, at pp. 638-639; *Detroit, T. & I. R. Co. Control*, *supra*, at pp. 491-492. As the Commission found (R. 35, 39), it will be in the self-interest of Santa Fe and Pennsylvania, in order to insure a substantial return on their investments, that they continue the present solicitation and service

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\* See the testimony of the President of Santa Fe (R. 357, 358, 434-435), the President of Pennsylvania (R. 513), the Vice-President of Traffic of Santa Fe (R. 503), the Vice-President of Freight Sales and Services of Pennsylvania (R. 572). See, also, the testimony of the President of Western (R. 1584).

policies which have been responsible for Western's success. The Commission also observed that the checks and balances inherent in control equally divided between the largest connecting carrier on the eastern extremity of Western and the largest connecting carrier on the west will work to prevent impairment of service or discriminatory solicitation (R. 46); see pp. 54-55, *infra*). In addition, conditions were imposed in the Commission's order, and these are designed to insure that existing routes and channels of trade will be maintained (R. 40-41).<sup>10</sup>

Moreover, the Commission pointed out in considerable detail, the geographic relationship of the Santa Fe and Pennsylvania to Western, the major role they played in Western's development, and the extensive interchange traffic which the Santa Fe and Pennsylvania now enjoy via Western, gave further assurance of their interest in the continued development of the Peoria gateway. Thus, the Commission noted (R. 21-22):

\* \* \* Much of the success of Western as a bridge line dates from the construction of a western connection with the Santa Fe at Lomax in 1927, authorized in *T., P. & W. R.R. Construction*, 124 I.C.C. 278. In 1928, the first full year after completion of the Santa Fe-Western

<sup>10</sup> There are adequate enforcement powers should these conditions not be carried out. See Interstate Commerce Act, Sections 5(9), 12(1), 16(8), 49 U.S.C. 5(9), 12(1) and 16(8); cf. *Atlantic Coast Line R. Co. v. United States*, 284 U.S. 288; *United States v. Texas & Pacific Ry. Co.*, 12 F. Supp. 511 (N.D. Texas); *City of New Orleans v. Texas & N.O. R. Co.*, 195 F. 2d 882, 886 (C.A. 5).

Lomax connection, the Western interchanged a total of 29,697 carloads of traffic with the Pennsylvania and 7,264 carloads with the Santa Fe. By 1955, the corresponding figures increased to 58,543 carloads, or 97 percent, and 34,755 carloads, or 378 percent, respectively.

Over the years, the Santa Fe and the Pennsylvania have cooperated with Western in coordinating their schedules and services. In 1930 arrangements were made for the establishment of coordinate schedules for the handling of perishables from Santa Fe origin territory, and the Western constructed icing facilities at Peoria to accommodate such traffic. Today, the Santa Fe, Western, and Pennsylvania schedules are set up to provide a fully competitive service over the Western route. \* \* \*

See R. 464-468; Exs. H-5, R. 1641, H-8, R. 1661-1662, H-16, R. 1705, H-121, R. 1983-1984.

The Commission found, and it is undisputed, that Western interchanges more interline traffic with Santa Fe and Pennsylvania than with all of its other connections combined, this interchange accounting for almost 70% of Western's gross revenues (R. 22; see Ex. H-5, R. 1632-1650):

For the year ended June 30, 1955, the latest period for which both car and revenue data were available, the total freight revenue of Western was \$6,920,432. Of a total of 105,705 cars of interline traffic handled during the period, 74,772, or 70.7 percent, were interchanged with the Santa Fe and/or Pennsylvania. Such interchange accounted for \$4,404,318 or 69.8 percent, of Western's gross revenues for



that year. The Burlington and The New York Central Railroad Company ranked third and fourth in the volume of interchange with Western, and the Rock Island, Nickel Plate, and Minneapolis ranked fifth, sixth and seventh, respectively. The protection of interchange traffic was one of the principal reasons advanced by the applicants, and recognized by us in approving acquisition of control in *Detroit, T. & I. R. Co., Control*, 275 I.C.C. 455.

The *Detroit, T. & I. R. Co.* case, *supra*, is strikingly similar to the present case. There the Commission authorized joint control of the Detroit by Pennsylvania and the Wabash, stressing the fact that the two applicants were its largest interchange connections. Observing that the Wabash and Pennsylvania were "the most logical owners," the Commission added that, "On the basis of present interchange their interests are superior to those of any other carrier in the area." (275 I.C.C. at 492.) And in *Spokane International R. Co. Control*, 295 I.C.C. 425, 441, order affirmed, *Canadian Pacific R. Co. v. United States*, 158 F. Supp. 248 (D. Minn.), Union Pacific's preponderance in interchange with Spokane International was a factor which the Commission considered in authorizing it to acquire control of the latter.

The complementary geographical relationship of Santa Fe, Western, and Pennsylvania, their record of mutual cooperation, and their common economic interest as reflected in the value of interchange strongly supported the Commission's decision. These factors disclose the legitimate interest of Santa Fe and Penn-

sylvania in seeking to acquire control of Western upon learning that its present owners desired to sell. (R. 370-371, 514, see also R. 358, 363-364, 513.) Most importantly, they provide the best possible assurance for the future stability and further development of Western.

This comports with the views of the shipper witnesses, all of whom supported the application of Santa Fe and Pennsylvania, as the Commission noted (R. 46):

Several nationally prominent traffic executives of large industrial concerns, which annually route a substantial volume of traffic via Western testified in support of Santa Fe and Pennsylvania joint ownership. They based their support upon the fact that the Santa Fe and the Pennsylvania are presently rendering excellent service in conjunction with Western and that ownership by them would constitute their best assurance of continued good service via the combined Santa Fe-Western-Pennsylvania route, as well as via each of the other connections of Western.

It is most significant that communities along the entire length of Western's line, shippers located on Western, off-line shippers using Western as an inter-line or bridge carrier and Western's employees were unanimous in their support of the application of Santa Fe and Pennsylvania. In contrast, not a single shipper supported the Minneapolis proposal. Only three of Western's sixteen rail connections were in opposition (R. 46), and two of these were equally opposed to the Minneapolis application (R. 19-20).

(2) In contrast to the Santa Fe-Pennsylvania proposal, the Minneapolis proposal, as the Commission found (R. 30):

\* \* \* unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works. Only the corporate existence of Western would remain. For all practical purposes Western would be integrated, consolidated and merged into the Minneapolis' for ownership, management and operation. \* \* \*

As the district court indicated (R. 102), "The advantages to Minneapolis in adding Western to its railway system seem apparent. No doubt Minneapolis would be materially strengthened". But, as the Commission found, these advantages would be largely at the expense of other carriers connecting with Western and the Western employees and would, if the benefits of Minneapolis' plan are to be carried into effect, necessarily result in elimination of Western as the neutral bridge line now performing such a useful public service (R. 30).

In its brief, Minneapolis protests that it "could not do otherwise than maintain a policy of neutrality" (Br. 31), and that conditions similar to those made part of the order approving the Santa Fe-Pennsylvania acquisition could fully protect the other carriers and the shipper and community interests (Br. 30). But this is a belated attempt to convert its basic proposal into one approximating that offered by the successful applicants; it is wholly at odds with the nature

of its proposal as offered and with its own supporting evidence. Minneapolis' contention that it would "naturally" maintain the neutrality of Western is also inconsistent with its claims (Br. 70) that the goal of its program of absorption of Western was to "foster and stimulate" competition between the unified Minneapolis-Western combination and the other carriers.

It is not disputed that under Minneapolis control Western would be integrated into its parent so as to be operated as a part of Minneapolis, indeed as a division of that carrier, thereby eliminating Western as a competitor and converting what are now interchange points on a separate Western to interchange points on a unified Minneapolis-Western. The entire program for the establishment of new service routes via these interchange points, as detailed by Minneapolis' Vice-President of Traffic, Roy W. Nelson, is designed to secure additional traffic for Minneapolis' line north and north-west of Peoria by diverting it from the lines of other carriers (R. 1177-1185). Although Mr. Nelson talked of creating new traffic via Minneapolis and Western (R. 1178), it is apparent that the traffic is to be diverted from other lines at Chicago and St. Louis (R. 1029, 1178) or from Western's connecting lines (R. 1184). Thus, traffic is to be secured by diversion from the direct Chicago-Twin Cities lines (R. 1178), including the Milwaukee (R. 1198), Chicago & North Western (R. 1198), and Rock Island (R. 1199-1200); and by short-hauling carriers connecting with Western's line east of Peoria, such as, the Gulf, Mobile and Ohio (R. 1179-1180, 1197), Chi-

cago and Eastern Illinois (R. 1180-1181, 1197), Illinois Central (R. 1178-1179, 1195), and Wabash (R. 1182, 1202, 1198). Minneapolis will "actively solicit" this traffic (R. 1184).

Consistent with the above evidence, the Commission stated (R. 31-32) that "under unified operations, the Minneapolis proposes to establish coordinated schedules between it, the Western, and the connecting carriers, providing new service routes via these additional junctions for moving traffic in all directions. The record shows that such a policy would be extremely harmful to other carriers."

Thus, the Rock Island estimated its potential losses from diversion of traffic under the Minneapolis plan at more than \$6,000,000 (R. 1542-1545); the Nickel Plate introduced testimony that its losses would be heavy (R. 1324-1326); and the testimony with respect to the Wabash indicates a substantial, if not precisely determined, potential loss (R. 1270-1271, 1292-1293).

It is thus apparent that the Minneapolis plan for operation of Western tends to defeat important objectives sought by the Commission and by virtually all of the parties participating in the proceeding. It is predicated upon integration of Western into Minneapolis with the operations controlled by Minneapolis and the direction emanating from the headquarters of Minneapolis; and it contemplates an aggressive traffic program designed to divert traffic now enjoyed by other lines.

C. THE COMMISSION GAVE PROPER CONSIDERATION TO THE OTHER FACTORS RELEVANT TO A CHOICE BETWEEN THE APPLICANTS

We consider, next, the Commission's conclusions with respect to the interests of the employees of the affected carriers; the reasonableness of the purchase price; and the relative advantages of the two proposals in terms of industrial development, increase in rolling stock, and economies and efficiency of operation.

1. Section 5(2)(c) provides that, in determining whether a transaction is in the public interest, the Commission shall give weight to "the interest of the carrier employees affected." Section 5(2)(f) states that, as a condition of its approval, the Commission shall require an equitable arrangement to protect affected employees for a limited period. To this end, the Commission is to provide for compensatory allowances to protect employees who will be affected by the transaction (accomplished here by imposing a condition requiring compliance with the Washington Job Protection Agreement of 1936) (R. 44, 49).

Operation of Western under the joint control of Santa Fe and Pennsylvania as an autonomous railroad under responsible local management would obviously have little adverse effect on employees. This is borne out by the testimony of the chief executives of Santa Fe and Pennsylvania that the two roads are satisfied with the management and staff of Western and that no changes in personnel or in the loca-

tion of the headquarters of Western at Peoria are contemplated. (R. 357-360, 434-435, 459-460, 511, 513, 541.) The employees unanimously favored the granting of the application of Santa Fe and Pennsylvania and opposed that of Minneapolis (R. 44; Reply of Railway Labor Executives' Association to Exceptions of Minneapolis, R. 2010).

In contrast, grant of the Minneapolis application would have severe employee consequences. In fact, a principal argument of Minneapolis in support of its application is based on alleged economic, three-fourths of which would be accomplished at the expense of the employees (R. 32). Minneapolis introduced evidence purporting to show that by unification the combined operating expenses of the two roads could be reduced by \$1,770,945 (R. 32), of which \$1,327,062 would take the form of wages and salaries to be saved through the elimination of 256 positions (Ex. H-44, R. 1918-1924). It further appeared that the bulk of the positions to be abolished would be in Peoria (R. 1379). Consequently, even those employees fortunate enough to be transferred, rather than released outright, would have to undergo the serious inconveniences involved in reestablishing homes in a new community.

We agree that the fact that some employees will be displaced is not a bar to approval of a Section 5 application when the transaction is otherwise clearly in the public interest. Nevertheless, the effect on employees



is a factor to which the Commission is required to give weight. It is apparent that it was accorded appropriate consideration here (R. 31, 32, 44).

2. As the Commission pointed out, the stock of Western is not listed on any exchange, but its market value of \$135 per share was established on the basis of agreement between a willing buyer and a willing seller (R. 42). This is not altered by the fact that an earlier understanding called for a \$100 purchase price, as Minneapolis seems to contend (Br. 38). Certainly, Santa Fe and Pennsylvania are not proposing to pay a higher price than necessary in order to acquire the stock. It is the price which Minneapolis and the railroads which sought inclusion were prepared to pay (R. 42), and was obviously considered fair and reasonable by them.

Minneapolis argues that the price is reasonable as to it (though not as to Santa Fe-Pennsylvania) because of the alleged economies which it anticipates. But apart from the uncertain nature of these economies (see R. 1204-1205) and the likelihood that they are exaggerated (R. 1579), there is, to say the least, no certainty that Western would continue to prosper under a plan which represents a complete departure from the policies which have made Western successful.

Contrary to the implication in the Minneapolis brief, the Commission, in determining the reasonableness of the price, gave proper consideration to the potential earning capacity of Western. Thus, in arriving at its conclusion the Commission took note

of the following factors not mentioned by Minneapolis (R. 42): (1) the excellent physical and financial condition of Western, (2) its good earnings and operating record, (3) the value of its properties as fixed by the Commission for rate-making purposes, (4) its progressive and able management, and (5) its strategic location, which adds to its value as a long-term investment. Cf. *Graves Truck Line, Inc.—Purchase—Whitworth*, 59 M.C.C. 601, 604-605.

In addition, in keeping with the statutory mandate, the Commission made the further unchallenged finding that "The transaction proposed by the Santa Fe and the Pennsylvania does not contemplate a guaranty or assumption of the payment of dividends or fixed charges, and there will be no increase in total fixed charges." (R. 49.) The obvious purpose of the requirements of Section 5(2) (b) and (c), *i.e.*, that the Commission consider the reasonableness of the terms of purchase and the total fixed charges resulting from the transaction proposed, is to erect a safeguard against improvident use of funds by a purchasing carrier, which might impair its ability to function in the transportation field. Clearly, that purpose is fully satisfied here.

3. The Commission also adverted to the industrial development along Western's right of way, and to certain other benefits which joint ownership by Santa Fe and Pennsylvania could be expected to give to Western. Minneapolis contests these findings and

argues that, on the contrary, it should have been given a strong preference because of the economies and efficiencies of operation flowing from the integration of Western into its system.

With respect to industrial development, the Commissioner found as follows (R. 46):

With the backing of the Santa Fe and the Pennsylvania, there are excellent prospects for locating new industries on Western which will substantially increase the traffic originating and terminating on its line. Western has large acreages of potential industrial property in the Peoria area, and at other points along its line, and with the combined efforts of the industrial development departments of the Santa Fe and the Pennsylvania, such property development may be expected without undue delay.

Minneapolis attacks this finding, arguing that both Santa Fe and Pennsylvania would prefer to locate industry on their own lines (Br. 44). However, there is ample supporting testimony (R. 485-487, 571, 574-575, 582-583). The incentive for Santa Fe and Pennsylvania to assist in locating industry on Western is clear when it is realized that Western is favored with an abundance of potential industrial property both in Peoria and along its line (R. 486, 575), while both Santa Fe and Pennsylvania are lacking in industrial property in the area (R. 485-486, 582). As the president of Santa Fe testified: "It will be the attitude of the Santa Fe to try to help the T. P. & W. in every respect to locate industries

along its line \* \* \* not only because we are going to be a half owner and accrue benefits, but also the selfish reason we have limited industrial area in Chicago which makes it much more attractive to us to help the T. P. & W." (R. 486). The advantage of Santa Fe-Pennsylvania ownership as a stimulus to industrial development was recognized by the communities served by Western as well as by business interests in the area (R. 47; see 638-640, 758-759, 790, 807, 820, 940, 950, 957-958, 961).

Under Minneapolis control, on the other hand, Western would be just a division, with no sales force of its own, and the impetus for making use of the property along the Western line would be weaker. This would be particularly true of the entire portion of the Western line between Peoria and Lomax, which is directly in competition with the main line of the Minneapolis between Nemo and Peoria. While Minneapolis, by the time of the hearing had, for obvious reasons, discarded its earlier consideration of abandoning this line, and was willing to accept a condition against such abandonment (R. 31), its lack of incentive for expending major efforts on this important part of Western's line is apparent (see R. 615, 760, 773, 846-848, 958, 962).

The Commission further found that the supply of freight cars available to Western would be materially increased under joint control by Santa Fe and Pennsylvania, and that the latter roads would see to it that the car ownership obligations of Western were met in full (R. 47). Minneapolis criticizes this as

an expression of faith, not fact (Br. 43-44). But, we submit, it is a permissible judgment based on testimony of record (R. 368-369).

Finally, the Commission took note of other benefits, such as advice and assistance in the technique of railroad management, the realization of economies in operation and advantages in purchasing, which would be expected to accrue to a small railroad under ownership of two large, well-staffed roads (R. 47). Minneapolis stresses the economies which allegedly could be realized under its proposal (Br. 24-25). Manifestly, extensive economies are not contemplated under the plan of Santa Fe and Pennsylvania, predicated as it is on maintaining Western in its present status as a separate railroad under responsible local management. But possible economies comprise only one of a number of factors which the Commission must consider in determining consistency with the public interest. *Virginian Ry. Co. Control*, 117 I.C.C. 67, 75. The importance of proposed economies of operation in determining the public interest in a proposed acquisition will necessarily vary with the financial strength of the railroads involved and their present degree of operating efficiency. Since Western is now a well-run, successful property in excellent physical condition, the economies which Minneapolis claims would be realized through its absorption of Western would, in any event, be less significant than would be the case in other situations. To the extent that these economies are to be achieved at the expense of Western's employees and through Western's destruction as

a neutral bridge carrier performing a function the Commission has found to be in the public interest, they fail to furnish affirmative support for the Minneapolis case.

## II

THE COMMISSION GAVE APPROPRIATE CONSIDERATION TO THE COMPETITIVE EFFECTS OF THE ACQUISITION OF CONTROL OF WESTERN BY THE SANTA FE AND PENNSYLVANIA

Minneapolis argues that the Commission, in giving approval to the Santa Fe-Pennsylvania acquisition of Western as comporting with the "public interest", failed to give proper consideration to the application of the antitrust laws. Both the Sherman and Clayton Acts, it is contended, would be violated by the transaction which the Commission approved. As we shall show, however, appellant misconstrues the role of the antitrust laws in the Commission's consideration of potential railroad combinations. Neither the language of Section 5 of the Interstate Commerce Act nor the controlling cases requires the Commission to determine antitrust questions as such or to make findings in terms of the antitrust laws. To be sure, the Commission must give adequate consideration to possible anti-competitive aspects of a proposed railroad acquisition; the answer is that it has done so here.

1. Preliminarily, we review briefly the development of Congressional policy on railroad mergers, consolidations or acquisitions. The original Interstate Commerce Act of 1887 was concerned largely with the pro-

tection of shippers. As the Court observed in *McLean Trucking Co. v. United States*, 321 U.S. 67, 80-81, "the effort of Congress [was] directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates; and emphasis on the preservation of free competition among carriers was part of that effort." By the Mann-Elkins Act amendments of 1910, the Commission was given broad power to prescribe and control rail rates. However, prior to 1920, the Interstate Commerce Act was silent as to railroad combinations, thus leaving them fully subject to the antitrust laws. *Northern Securities Co. v. United States*, 193 U.S. 197; *United States v. Union Pacific R.R. Co.*, 226 U.S. 61; *United States v. Reading Co.*, 253 U.S. 26; *United States v. Southern Pacific Co.*, 259 U.S. 214.

The Transportation Act of 1920 (41 Stat. 456) embodied a drastic change in Congressional policy toward the railroads. It followed a near breakdown in rail transportation during World War I, which resulted in two years of federal operation. Also, it reflected the precarious financial condition of the railroads at the end of the period of federal control. This change was described by the Court in the *McLean* case, 321 U.S. at p. 81, as follows:

\* \* \* The Act of 1920 added "a new and important object to previous interstate commerce legislation." It sought "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country." *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456, 478; *Texas & Pacific Ry.*



*Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 277. And in administering it, the Commission was to be guided primarily by consideration for "adequacy of transportation service, \* \* \* its essential conditions of economy and efficiency, and \* \* \* appropriate provision and best use of transportation facilities \* \* \*" *New York Central Securities Corp. v. United States*, 287 U.S. 12, 25.

Specifically, in the Transportation Act of 1920, Congress found the general national economic policy of competition to be inadequate to provide a transportation system sufficient for the nation's needs. A major element in the new policy was the affirmative encouragement of unification as a partial cure for railroad problems.

For the first time, in amended Section 5(2) of the Interstate Commerce Act, 41 Stat. 481, the Commission was authorized to approve as "in the public interest" the acquisition by one railroad of control of another "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation."

Moreover, Section 5(4), 41 Stat. 481, provided that after notice and hearing:

The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible

and wherever practicable the existing routes and channels of trade and commerce shall be maintained. \* \* \*

Section 5(6), 41 Stat. 481, provided that "It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation," upon the condition, *inter alia*, that the proposed consolidation "be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and \* \* \* be approved by the Commission." Section 5(8) exempted from the antitrust laws consolidations approved under Section 5.

In brief, Section 5, as rewritten by the Transportation Act of 1920, not only permitted railroad mergers and consolidations, but encouraged them within the outlines of the general consolidation plan which the Commission was directed to prepare and adopt. Indeed, as the Court recognized in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 305-306, 315-321, the controversial question with respect to railroad mergers and consolidations from 1919 to 1940 was not whether they should be permitted, but whether they should be compelled. And see Leonard, *Railroad Consolidation Under the Transportation Act of 1920* (1946).<sup>11</sup>

<sup>11</sup> By Title II of the Emergency Railroad Transportation Act of 1933 (48 Stat. 217), Congress recast the provisions of Section 5, subjecting all forms of unification to Commission jurisdiction under a uniform rule. The provision relating to the

The objective of the 1920 Act, *i. e.*, extensive voluntary railroad consolidations into a limited number of systems, was not realized, and the Commission asked repeatedly to be relieved by Congress of its responsibility for working out such a national plan of consolidation. As a result, the Transportation Act of 1940 abandoned the attempt, begun in 1920, to channel voluntary consolidations into a predetermined national plan of consolidation. Section 5 was redrafted and took substantially its present form. Section 5(2)(a) provides that "It shall be lawful, with the approval and authorization of the Commission \* \* \* for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; \* \* \* ." Section 5(2)(b) provides that " \* \* \* If the Commission finds that \* \* \* the proposed transaction \* \* \* will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: \* \* \* ." Section 5(2)(c) declares:

In passing upon any proposed transaction under the provisions of this paragraph (2), the adoption by the Commission of the consolidation plan was retained. But the separate paragraphs dealing with acquisitions of control and with consolidations were combined into a single paragraph governing all types of combinations of railroad properties (including those effected by noncarriers such as holding companies, hitherto not required to be approved by the Commission). The paragraph empowered the Commission to approve proposed combinations, including acquisitions of control and consolidations, provided they were in harmony with the Commission's consolidation plan and would "promote the public interest."

Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

In addition, Section 5(2)(d), an echo of the former provisions for a national consolidation plan, empowers the Commission to condition its approval upon the inclusion in the transaction of other railroads in the territory involved who request such inclusion. And Section 5(11) provides that "The authority conferred by this section shall be exclusive and plenary \* \* \* and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved \* \* \*"<sup>12</sup>

Section 5(4) of the 1920 Act had provided that in the division of railroads "into a limited number of

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<sup>12</sup> In like vein the last paragraph of Section 7 of the Clayton Act, 15 U.S.C. 18, expressly provides that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the \* \* \* Interstate Commerce Commission \* \* \* under any statutory provision vesting such power in such Commission \* \* \*."

systems \* \* \* competition shall be preserved as fully as possible." Significantly, the present Section 5(2) (c), in prescribing statutory standards to govern the Commission's public interest determination, does not mention the preservation of competition—a failure which is emphasized by the command of Section 5(2) (b) that the Commission shall not approve a transaction involving both a railroad *and* a motor carrier unless it finds that the transaction "will not unduly restrain competition."

In summary, since 1920, Congress in dealing with recurrent railroad problems, has deliberately developed specific policies in lieu of the general national economic policy of free and unrestrained competition.<sup>13</sup>

2. Asserting that acquisition of control of Western by Santa Fe-Pennsylvania would violate the antitrust laws, Minneapolis contends (1) that "Pennsylvania-Santa Fe could not sustain their application without an affirmative showing that the antitrust laws

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<sup>13</sup> In contrast, the Declaration of Policy in Section 2 of the Civil Aeronautics Act of 1938 (49 U.S.C. 402) provides as follows:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"

See also, Section 314 of the Communications Act (47 U.S.C. 314).

would not be transgressed" (Br. 68), and (2) that the Commission's order is invalid in the absence of an inquiry into whether the acquisition would violate the antitrust laws, findings respecting the nature and scope of the alleged antitrust violations, and findings of advantages to the public outweighing the harm attendant upon violation of the antitrust laws (Br. 48, 59-60, 70).

These contentions have already been rejected by this Court in *McLean Trucking Co. v. United States*, 321 U.S. 67. In that case the Commission authorized, pursuant to Section 5(2), a consolidation of seven large motor carriers to form the largest motor carrier in the United States. As the Court noted (p. 77), the chief attack was "that the Commission improperly construed the standards by which Congress intended it to determine the propriety of a consolidation; and the burden of this complaint is that it did so by failing to consider and give due weight to the anti-trust and other laws of the United States." "

At the outset, the Court expressly rejected the contention that the Commission lacks power to approve a transaction which, but for that approval, would violate the antitrust laws, pointing out that such a view of the Commission's authority would render Section 5(11) meaningless. 321 U.S. at pp. 77-79, 86. The Court then noted (p. 79) that the "Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act."



After reviewing the development of Congressional policy as to transportation, including the National Transportation Policy "which is the Commission's guide to 'the public interest' " (p. 82), the Court said (p. 83):

The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5(11), that the policies of the antitrust laws determine "the public interest" in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp. v. United States*, 287 U.S. 12, has its counterpart in motor carrier policy. \* \* \*

Continuing, the Court stated, that "there can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. \* \* \* And in authorizing those consolidations [Congress] did not import the general policies of the anti-trust laws as a measure of their permissibility." The Court concluded (pp. 85-86), "Against this background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation



policy." Moreover, the Court expressly noted that, in view of the unique Congressional history of fostering railroad consolidations, the policies of the anti-trust laws were, if anything, to be accorded less weight in rail than in motor consolidations. See 321 U.S. at 78, 85.<sup>15</sup>

To be sure, the Court made it clear that the Commission may not ignore the policy of the antitrust laws as a relevant and significant factor in its deliberations. It set forth the duty of the Commission and the function of the reviewing court as follows (pp. 87-88):

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may

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<sup>15</sup> Subsequently, in *Schwabacher v. United States*, 334 U.S. 182, 198, in passing on the relative function and authority of federal and state law respecting a railroad merger, this Court stated flatly, "We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act." And, more recently, in *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, this Court emphasized that the effect upon competition is not necessarily the governing consideration in the resolution of the problems of closely regulated industries.

be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest." Cf. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U.S. 452; *Pennsylvania Co. v. United States*, 236 U.S. 351; *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344; *Purcell v. United States*, 315 U.S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order.

Accordingly, the Minneapolis contentions which are predicated upon the absence of findings in terms of the antitrust laws are without merit. Indeed, the report sustained in the *McLean* case (*Associated Transport, Inc.—Control and Consolidation*, 38 M.C.C. 137) did not discuss the competitive effects of that extensive consolidation in terms of the antitrust laws and it made no reference to the Sherman or Clayton Acts.

3. In its report in the present case, the Commission, after a careful analysis of the effects of a Santa Fe-Pennsylvania acquisition on "competition and diversion of traffic" (R. 33-39, see also R. 25-26, 40-41, 46), concluded (R. 39):

\* \* \* We are convinced that the benefits to be derived from the operation of Western under the control of the Santa Fe and the Pennsylvania as proposed will be in furtherance of the

over-all national transportation policy declared by the Congress, and its consummation will not unduly curtail competition in connection with the other carriers. Compare *McLean Trucking Co. v. U.S.*, 321 U.S. 67.

This determination, fully supported by numerous subsidiary findings, demonstrated to the district court that "the Commission did give due consideration to the effect of the acquisition on competing carriers and the possible curtailment of competition, and weighed such factors as against the broad question of public interest" (R. 101), and that "\* \* \* its conclusions are not without substantial foundation" (*ibid.*).

The Commission devoted much of its long report to a discussion of the factors bearing on the competitive situation, including a detailed analysis of the effect of the proposed acquisitions on competing carriers. It described the routes, size, and importance of the railroads principally involved (R. 25-30). After referring to the competition existing between the various interested railroads, the Commission pointed out that "All the carriers endeavoring to participate in its control are in competition with Western." R. 33.) For example, the routes of Santa Fe and Pennsylvania via the Chicago gateway compete with Western's route through Peoria; Nickel Plate is in competition with the eastern half of Western; and the Minneapolis line between Nemo and Peoria competes with the western half of Western. (R. 31, 33.) However, while Santa Fe and Pennsylvania ordinarily solicit for their long hauls, they have not worked against Western; even prior to the proposed acquisi-

tion, they offered only passive resistance against Lomax and Effner, respectively, in recognition of the benefits they received from the Western route (R. 34). Indeed, as the Commission found (R. 21-22), the co-operation of Santa Fe and Pennsylvania, including the construction of the connection with Santa Fe at Lomax, played a major role in the development of the fast through service which has contributed so greatly to the success of Western. More than 70 percent of Western's interline traffic is now interchanged with Santa Fe and/or Pennsylvania (R. 22).

Continuing, the Commission pointed out that "all but a very small part of the nation's traffic is routed by the shipper" and set forth the factors which influence that routing (R. 34-35; see 477-479, 499, 723-724, 730, 778, 1483). It concluded that "These factors are operating today and are reflected in the present division of traffic among all of Western's connections, and since no change in service is contemplated with Western under the control of the Santa Fe and the Pennsylvania, the volume of traffic handled by the protesting intervening carriers should not be materially affected" (R. 35). And it found that "the self-interests of the Santa Fe and the Pennsylvania provide further assurance that the Western's present solicitation and service policies will be continued. Those policies have been responsible for the success of Western in the past, and the best way for the Santa Fe and the Pennsylvania to insure a substantial return on their investments to be made herein is to see that the Western management is left free to con-

tinue them" (R. 35; see 503, 725-726, 728, 730, 790-791, 845-846).

The Commission further found (P. 46):

\* \* \* No greater protection could be afforded to carriers interchanging traffic with Western than to have ownership divided equally between the largest connecting carriers in the east and the largest one in the west. Under this built-in system of checks and balances, it is inconceivable for the Santa Fe to permit impairment of service or discriminatory solicitation with respect to eastern connections, or the Pennsylvania with respect to western ones. \* \* \*

The nature of these "checks and balances" is apparent from the undisputed testimony reflected in the findings. Located on the eastern extremity of Western, Pennsylvania receives a large volume of traffic which is bridged by Western between Pennsylvania and Western's connections on the west, such as Burlington, Rock Island, and Minneapolis; Santa Fe, on the west, receives valuable traffic via Western from such eastern connections as Nickel Plate and New York Central. (R. 371-372; Ex. H-5, R. 1649). Obviously, neither could afford to permit the other to do anything detrimental to the traffic it enjoys and the carriers which supply it (R. 371-372, 503, 575). That railroads serving east-west gateways cannot afford to favor one connection to the detriment of the others was conceded by the Freight Traffic Manager of Minneapolis (R. 1137) and is reflected in the policy of Nickel Plate (R. 1328). Should Santa Fe

attempt to prefer an eastern carrier, or Pennsylvania a western carrier, Santa Fe would antagonize all its other eastern connections and Pennsylvania would antagonize its other western connections (including their connections at other east-west gateways as well as the lines which connect with Western) (R. 484-485, 496-497). Cf. *Chicago, B. & Q. R. Co. Control*, 271 I.C.C. 63, 154.

The Commission also found (R. 46) that the agreement between Santa Fe and Pennsylvania setting forth their proposed method of operation and objectives (R. 24), together with the conditions imposed with respect to the maintenance of all existing routes and channels of trade of Western without discrimination (R. 40-41), is adequate to protect Western's connections.

Finally, the Commission examined the specific claims of diversion of traffic advanced by Minneapolis, as well as by Nickel Plate and Rock Island, and found them to be grossly exaggerated, if valid in any respect (R. 35-39). We need not discuss the matter further here, since Minneapolis has contented itself with a bare assertion that the Commission "brushed off" its "unchallenged evidence" of the loss it would suffer from the Santa Fe-Pennsylvania acquisition (Br. 30)—a statement patently at variance with the facts (see R. 35-37).

4. Minneapolis charges that control of Western by Santa Fe and Pennsylvania would permit the latter roads to strangle the Peoria gateway to the advantage of their positions in other gateways and that they have

a specific intention to do so (Br. 59-65).<sup>15</sup> This contention, too, was properly rejected by the Commission. It ignores the record of cooperation between Santa Fe and Pennsylvania, on the one hand, and Western, on the other, and the resulting substantial traffic interchange. It assumes that Santa Fe and Western wish to invest substantial funds to acquire Western in order to reverse their policy of cooperation and bring about Western's downfall, contrary to their own self-interest and the assurances of their responsible officers. See pp. 26-30, *supra*.

Control of Western is not control of the Peoria gateway. There are numerous competitive east-west routes through Peoria which do not include Western, formed by such railroads as Minneapolis, Rock Island, and Burlington on the west and Nickel Plate, New York Central (through its subsidiary, the Peoria & Eastern), and the Chicago & Illinois Midland-Baltimore & Ohio routes on the east (R. 728, 846; Exs. H-4.

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<sup>15</sup> Minneapolis also contends that control of Western by Santa Fe and Pennsylvania would tend to "monopolization in the east-west gateways" (Br. 59). This vague and unsupported charge is clearly erroneous, as an examination of any comprehensive railway map will show. For example, Santa Fe serves only Chicago; Pennsylvania serves both the Chicago and St. Louis gateways, as does the Baltimore and Ohio; Nickel Plate and New York Central each serve the Chicago, Peoria, and St. Louis gateways from the east; and Rock Island and Burlington each serve all three gateways from the west. Other important railroads serve one or more of these gateways. Thus, Chicago is served by such major railroads as the Erie and Chesapeake & Ohio from the east, the Chicago & North Western and Milwaukee from the west. A similar situation prevails at St. Louis.



R. 1615, H-11, R. 1672). A substantial volume of traffic moves over these routes in which Western does not participate at all (Exs. H-126, R. 1993, H-128, R. 2002).

Moreover, contrary to Minneapolis' assumption, the movement of traffic over Western's route is not detrimental to Santa Fe and Pennsylvania. Plainly, the connection at Effner with Western is the only economic justification for Pennsylvania's line beyond Logansport, Indiana. Western provides Pennsylvania—and Santa Fe as well—with a valuable alternate route bypassing the congested Chicago gateway (R. 546, 570-571). Financially, Pennsylvania fares approximately as well on traffic via Effner and Western as by way of Chicago (R. 571). Both Santa Fe and Pennsylvania receive valuable traffic via Western from railroads which connect with Western (Ex. H-5, R. 1649). If the present service over Western's route were not maintained, much of this traffic would move over alternate routes cutting off Pennsylvania and Santa Fe entirely (R. 728-729).

Santa Fe has a strong interest in Western's route since it does not reach either the Peoria or St. Louis gateways while its western competitors, the Rock Island and the Burlington, serve the Chicago, St. Louis, and Peoria gateways directly. The movement of traffic via Western enables Santa Fe to obtain a long haul on east-west traffic, through its Lomax connection with Western, which might otherwise move through St. Louis, in which event Santa Fe would only receive a haul west of Kansas City or

lose the traffic entirely (R. 403, 479-483). This consideration explains Santa Fe's early interest in the Western route (R. 363). It was expressly recognized by the Commission in its discussion of Nickel Plate's claims of traffic diversion (R. 38-39).<sup>16</sup> It explains in large part Santa Fe's interest in its Lomax interchange with Western, despite the higher divisions accruing to Santa Fe at Chicago.<sup>17</sup>

<sup>16</sup> The Commission found:

"\* \* \* In 1954, the Nickel Plate interchanged a total of 14,497 cars with Western, of which the Santa Fe participated in the movement of 11,224 cars. Most of the Nickel Plate's traffic bridged from Lomax via the Western is perishable moving, in superior service, to points on the Nickel Plate and its connections. It provides the Santa Fe with a long haul to Lomax on traffic which otherwise might move via St. Louis. If the Western's connection with the Nickel Plate were not maintained as a service route, this traffic would be routed to the Nickel Plate at St. Louis, short-hauling the Santa Fe at Kansas City. Thus, the self-interest of the Santa Fe would assure the continuance of good service to the Nickel Plate at Peoria and prevent preferential solicitation by the Western for the Pennsylvania at Effner. \* \* \*

This is an illustration of the checks and balances referred to above.

<sup>17</sup> Minneapolis also makes a general and wholly unsupported charge that the acquisition of Western will tend to create a monopoly on the part of Santa Fe and Pennsylvania in their respective service areas (Br. 59-60) and that the Commission ignored the "over-all effect upon transportation of linking, and enlarging the sphere of influence of, two gigantic rail empires" (Br. 67). As the Commission's analysis of traffic diversion charges (R. 33-39) makes clear, the Santa Fe-Pennsylvania acquisition of Western under the terms of the plan here approved will result in little, if any, change in existing traffic patterns, and the two railroads (which are directly "linked" at Chicago) already share 70.7% of the total traffic exchanged by Western, a figure their joint ownership of Western should not substantially affect.

Minneapolis also contends (Br. 36-37, 61-62) that the Commission ignored the lesson of history to be found in Western's bankruptcy in 1917 while under Pennsylvania-Burlington control. But the Commission did not ignore the fact of Western's earlier receivership (see R. 21), and, as we have seen (*supra*, pp. 26-30), discussed in great detail the prevailing economic reasons which provided assurance that Santa Fe-Pennsylvania ownership of Western will serve the public interest. As the Commission pointed out (R. 21), the cooperative efforts between Western and the Santa Fe in constructing a connection between the two roads at Lomax in 1927 has been largely responsible for much of Western's subsequent success as a bridge line. Surely, the Commission was justified in determining the instant case upon the basis of the record before it and its current experience with similar acquisitions,<sup>18</sup> rather than on the basis of events occurring more than 40 years previously under totally different transportation conditions.

Finally, Minneapolis charges (Br. 64) that the Commission deviated from the standards previously applied in comparable situations. But, as might be expected with respect to matters as complex as the acquisition of railroads, the cited cases are by no means comparable to the instant one, and statements lifted from the context of those decisions are of little if any relevance here. Thus, *Interstate Commerce*

<sup>18</sup> See *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455; *Savannah & A. Ry. Co. Control*, 282 I.C.C. 39; *Pacific Coast R.R. Co. Control*, 282 I.C.C. 600.

*Commission v. Baltimore & Ohio R. Co.*, 152 I.C.C. 721, cited at several places in the Minneapolis brief, was not an acquisition proceeding under Section 5 of the Interstate Commerce Act at all, but a proceeding under Section 7 of the Clayton Act voiding the joint purchase, without prior Commission approval, of 51% of the stock of the Wheeling and Lake Erie Railway Co. by three of its major competitors. Subsequently, one of the three (the "Nickel Plate") was in fact authorized to take control of the railway under circumstances similar to those involved here ("Wheeling would continue to have an organization separate from that of the Nickel Plate, under control of the latter, and no change in traffic relationships with other railroads is contemplated," *Wheeling & L. E. Ry. Co. Control*, 267 I.C.C. 163, 176, 190). Similarly, the Commission's language quoted in the cited extract from the opinion of the District Court in *Canadian Pacific R. Co. v. United States*, 158 F. Supp. 248 (D. Minn.)<sup>19</sup> was utilized in rejecting a multiple acquisition of the Spokane International Railway by carriers in parallel, point-to-point, competition with it, which, the Commission found, would have resulted in a substantial dismantling of Spokane. See *Spokane International R. Co. Control*, 295 I.C.C. 425. As we noted *supra*, p. 29, the Union Pacific Railroad, which *was* authorized to acquire control of Spokane in the very same proceeding, had, like Santa Fe and Pennsylvania here, an end-to-end connection with

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<sup>19</sup> This three-judge district court was composed of the same three judges who, eight months later, approved the Commission's report and order in the instant case (See R. 93).

Spokane, was its most important interchange connection, and had cooperated with it for years in building up through traffic.<sup>20</sup>

### III

SECTION 10 OF THE CLAYTON ACT DID NOT PRECLUDE THE COMMISSION FROM AUTHORIZING THE PROPOSED ACQUISITION OF CONTROL PURSUANT TO SECTION 5 OF THE INTERSTATE COMMERCE ACT

Minneapolis contends (Br. pp. 50-58) that the Commission lacked power to authorize joint acquisition of control of Western by the Santa Fe and Pennsylvania because the latter's purchase of Western shares constituted a violation of Section 10 of the Clayton Act. We show that (1) there was no violation of Section 10, and (2) that, even if there were conflict with that provision, Section 5(11) of the Interstate Commerce Act would empower the Commission to authorize the acquisition.

1. Section 10 of the Clayton Act provides in pertinent part that no carrier "shall have any dealings in securities, supplies, or other articles of commerce," aggregating more than \$50,000 in any one year, with another corporation when any person who is a director of the carrier is, at the same time, a director of the

<sup>20</sup> *Chicago, B. & Q. R. Co. Control*, 271 I.C.C. 63, also cited by Minneapolis, is in no way analogous. It involved the proposed entrance of Santa Fe into St. Louis under circumstances in which it was clear that there would be substantial diversion of traffic from other lines, which might impair their abilities to continue to render adequate service. The Commission found no such likelihood of diversion here.

other corporation "unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission."

The alleged violation of Section 10 in the present case is predicated upon the fact that the Wilmington Trust Company, one of the trustees of the McNear estate (which owned 82% of Western stock), had four directors who were also directors of the Pennsylvania or its affiliate or subsidiary (Ex. H-73, R. 1944-5). The actual purchase of Western stock at \$135 per share from the McNear estate, as well as from the remaining stock owners, was made by Santa Fe; about a month later Santa Fe entered into an agreement to sell 50% of Western stock, at the same price, to the Pennsylvania (R. 23-24). However, the trustees, in earlier negotiations, had agreed to sell 26% of the stock to each of the railroads for \$100 per share (R. 174-176), and, after those agreements were repudiated,<sup>21</sup> it is alleged (Br. 10-11), the Penn-

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<sup>21</sup> There is disagreement between Pennsylvania and the trustees as to the continued validity of this agreement, and litigation is pending in which Pennsylvania seeks specific performance of this earlier contract of sale, or damages for the breach of that contract. Its agreement to purchase 50% of Western stock from Santa Fe is without prejudice to its action against the trustees, and the contract provides that if the Pennsylvania eventually secures any of the Western shares at the lower figure its obligation under the contract with Santa Fe is to be reduced in an equivalent amount so that both railroads will maintain their 50% ownership in Western (R. 24).



sylvania continued to work with the Santa Fe in seeking the consummation of the joint purchase of all Western stock (which was eventually accomplished). Thus, Minneapolis urges, there were "dealings in securities" between a carrier (Pennsylvania) and a corporation (the Wilmington Trust Company) having common directors, without the competitive bidding required by Section 10 of the Clayton Act.

It is clear, however, that the dealings in securities here involved are far removed from the type of transaction to which Section 10 of the Clayton Act was directed. The plain purpose of the section is to prevent a railroad from buying at too high a price or selling at too low a price as the result of a common relationship between the carrier and the seller or the buyer. The requirement of competitive bidding where such interlocking relationships exist is phrased in terms of the "bidder whose bid is most favorable to such common carrier," and, as the court below indicated (R. 99), has no application to competitive bidding by the railroad company. The carrier is to get the benefit of competitive bidding between those who desire to purchase from or sell to it, but the section does not seek to protect the interests of competing carriers who seek to purchase the same commodities.<sup>22</sup>

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<sup>22</sup> The legislative history of Section 10, though meager, supports the view that it was intended solely for the protection of the particular common carrier involved in the transaction. Indeed, the language of the several drafts of Section 10, together with the types of abuses cited in support of its enactment, strongly suggests that the words "dealings in securities" were intended to cover only a common carrier's dealings with related persons in its own securities. See H. Rep. 627, 63d Cong., 2d



Obviously, such a provision has little, if any, bearing upon an acquisition of control of one carrier by others under the provisions of Section 5 of the Interstate Commerce Act. Both the Santa Fe purchase agreement with the McNear trustees and the subsequent agreement by which Pennsylvania acquired a 50% interest in the Western stock were expressly made subject to Commission approval. This approval necessarily entailed a determination both that the transaction as a whole was in the public interest and that the price paid for the stock was reasonable. If the price paid for Western stock in the instant case was high, the factor determinative of this price was the competition for the stock between appellant and Santa Fe-Pennsylvania, rather than any relationship between the trustee and the Pennsylvania.

Moreover, as the court below pointed out (R. 98-99), the Wilmington Trust Company was acting not on its own behalf but as one of the two trustees of the McNear estate and "[w]e do not have a situation where interlocking directors may be enriched by reason of dealings in their securities and thus should be re-

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Sess., p. 3; S. Rep. 698, 63d Cong., 2d Sess., pp. 47-48; Sen. Doc. 585, 63d Cong., 2d Sess., pp. 8-9; 51 Cong. Rec. 15943. *In Re Missouri Pacific R. Co.*, 13 F. Supp. 888 (E.D. Mo.), cited by appellant, while expressing the view that securities other than the carrier's are covered by Section 10 of the Clayton Act, is not pertinent here; it involved a situation where the carrier was buying the controlling securities in a land development corporation from another subsidiary of its parent, the typical kind of transaction at which the section was aimed and one which, of course, was not subject to the approval of the Commission under Section 5 of the Interstate Commerce Act.

quired to sell securities only to a bidder whose 'bid is most favorable to the common carrier' ". Also, the direct purchaser of the stock from the McNear estate was the Santa Fe Railroad, which admittedly had no interlocking relationship with the Wilmington Trust Company or Western. It is true that the Santa Fe had had previous dealings with the Pennsylvania concerning a joint purchase of Western stock and that it later sold a 50% interest in Western to a Pennsylvania affiliate. It is clear, however, that the Santa Fe did not agree to pay more for the Western stock than it believed it was worth because of any relationship between Pennsylvania and the Wilmington Trust Company. On the contrary, as the Commission found (R. 44) "the Santa Fe \* \* \* had no commitments to sell any of it to any other railroad. Before offering to sell a portion of the stock to Pennsylvania several other joint control possibilities were considered and rejected." (See R. 367-368; Exs. H-80, H-81, H-82, H-83, R. 1964-1969.)

2. Apart from its conclusion that Section 10 of the Clayton Act had not been violated, the Commission ruled that Section 5(11) of the Interstate Commerce Commission Act, makes the "authority" over acquisitions conferred by Section 5 "exclusive and plenary" and relieves carriers participating in an approved transaction from the operation of the antitrust laws (R. 44). That section specifically provides that:

The authority conferred by this section shall be exclusive and plenary, \* \* \* and any carriers or other corporations, and their officers

and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for \* \* \*.<sup>23</sup>

Minneapolis contends that Section 5(11) operates only *in futuro* and confers "no authority to purge the taint of a transaction illegal at the time it was brought to the Commission." (Br. 58). This may be true in the limited sense that Commission approval of an acquisition proposal might not bar a subsequent criminal prosecution—the only sanction provided—for a violation of Section 10 occurring during the negotiations leading to the application. But, insofar as the acquisition itself is concerned, both the language of the section and the relevant court opinions make clear that Commission approval of the transaction, under Section 5 of the Interstate Commerce Act, is "exclusive and plenary" regardless of whether the acquisition would otherwise be in violation of the antitrust laws. See *McLean*

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<sup>23</sup> It is clear that Section 10 of the Clayton Act (15 U.S.C. 20) is included in the "antitrust laws" referred to in Section 5(11). Section 1 of the Clayton Act, 15 U.S.C. (1952 ed.) 12, provides that "Antitrust laws", as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title." And, in any event, Section 5(11) avoids any ambiguity by including "all other restraints, limitations and prohibitions of law, Federal, State or municipal."

*Trucking Co. v. United States*, 321 U.S. 67. Perhaps, the most dramatic example of this is *United States v. Southern Pacific Co.*, 290 Fed. 493 (D. Utah), sustaining the Commission's authority, after the adoption of what is now Section 5(11), as part of the Transportation Act of 1920, to approve the Southern Pacific's acquisition of the Central Pacific, an acquisition which this Court had previously held violative of the Sherman Act. See *United States v. Southern Pacific Co.*, 259 U.S. 214. What is true of acquisitions which themselves would otherwise violate the antitrust laws is certainly true of negotiations leading to proposals which are subject to the requirement of Commission approval.

This Court's decision in the *McLean* case, *supra*, at p. 86, indicates that the Commission probably could not "ignore" the policy embodied in Section 10 of the Clayton Act. But it is quite clear that the Commission did not do so. It gave particular attention (R. 42) to the reasonableness of the price paid by the Santa Fe and Pennsylvania for the Western stock. Under the circumstances, the Commission would have been remiss if it had made its determination on the basis of what was, at most, a technical breach of Section 10 rather than on the major issues of transportation policy committed to its expert judgment.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted.

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OCTOBER 1959.

## APPENDIX

National Transportation Policy (54 Stat. 899, 49 U.S.C., note preceding section 1) :

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, co-ordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5(2) of the Interstate Commerce Act (24 Stat. 380, as amended, 54 Stat. 905, 49 U.S.C. 5 (2)) :

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) —

“(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

“(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.”

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that



a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such

inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(11) of the Interstate Commerce Act (24 Stat. 380, as amended, 54 Stat. 908, 49 U.S.C. 5(11)):

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority, and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section

to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misde-

meanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18) :

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning

and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under



section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 10 of the Clayton Act (38 Stat. 734, 15 U.S.C. 20):

No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.



Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section, it shall be fined not exceeding \$25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

Section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. 1007(b)):

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

\* \* \* \* \*

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to

the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(e) of the Administrative Procedure Act (6 Stat. 243, 5 U.S.C. 1009(e)):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

\* \* \* \* \*

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6)

unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.



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REDACTED ST. LOUIS

COMPANY

FILE COPY

Nos. 12, 27, 28

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 12

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY

*Appellant*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, ET AL.

*Appellees*

No. 27.

STATE OF SOUTH DAKOTA and PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

*Appellants*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, ET AL.

*Appellees*

No. 28

STATE OF MINNESOTA and MINNESOTA RAILROAD AND  
WAREHOUSE COMMISSION

*Appellants*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, ET AL.

*Appellees*

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On Appeals from the United States District Court  
For the District of Minnesota

---

**PETITION FOR REHEARING OF APPELLANT, THE  
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY**

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COMMISSION, ET AL. *Appellees*

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STATE OF MINNESOTA and MINNESOTA RAILROAD AND  
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On Appeals from the United States District Court  
For the District of Minnesota

---

**PETITION FOR REHEARING OF APPELLANT, THE  
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY**

---

Appellant, The Minneapolis & St. Louis Railway Company, respectfully petitions for a rehearing of the decision and judgment of this Court, dated December 14, 1959, affirming the District Court and sustaining the Interstate

Commerce Commission. The grounds for the petition are stated below:

I.

This Court's opinion strikes a death knell for the statutory requirement of adequate, evidence-supported findings of fact. Complete paralysis of judicial review is demonstrated by the Court's ready acceptance, without examination of the proof, of findings made contrary to all the evidence, and by its overlooking the total absence of findings measuring an application against the statutory criterion. To this is added the statement in the Court's opinion (p. 19) that the law requires no more than consideration and discussion—that findings which may be tested against the statutory standards are not required.

A. The Santa Fe Traffic Vice President admitted, on cross-examination, a deliberate scheme to degrade service at the Nemo connection with Minneapolis in order to divert traffic to Lomax (R. 496). We showed that a loss of \$1.1 million in revenue—5% of our total—would result. (R. 1027, 1104, 1112-8, 1254, 1356-7, 1410-1) The Commission found that the traffic would not be lost because Minneapolis schedules were slower and the traffic "does not move on a competitive service basis". (R. 36) This finding ignores the timetable exhibit establishing the principal Peoria-Nemo service by Minneapolis as 15 minutes *faster* than the competitive Western run. (Ex. H-121, R. 1983-4) And this is the major movement, accounting for the principal part of the imperiled traffic. (R. 1355-7) The testimony that Western trains moved at 49 miles per hour compared to 30 miles per hour on Minneapolis was exposed as being the *maximum* in the former instance and

the *average* in the latter. (R. 1579, 1597) This Court has now sustained a central finding shown by the evidence to be mathematically false. We are here concerned not with judgment, or opinion, or interpretation or inference, but with a matter of cold mathematics. On that the Commission was simply wrong. And this Court has refused to look at the simple underlying numbers appearing in three brief record references.

B. The Minneapolis application proposed significant improvement in transportation service in terms of accelerated schedules and new service routes. No finding of any kind was made as to whether, or to what extent, the "public interest" would be advanced or the National Transportation Policy (49 U. S. C. preceding § 1) to promote "efficient service" would be enhanced by the proposed improvements.

The Commission's obligation to enter findings on this basic issue is not discharged by the generalization, cited in this Court's opinion (p. 8), that direct interchanges designed to eliminate inordinate switching delays "would be extremely harmful to other carriers". The statutory standard is "public interest" and the legislative goal is "efficient service"; injury to other carriers does not, as such, equate with either. If increased efficiency in transportation is to be rejected in the public interest, it must be upon a showing that the *harm to the public* flowing from adverse effects on other carriers outweighs the transportation improvement. No such balance was offered and the record facts deny its support for the ultimate result.

Indeed, the finding of harm rests on the flimsy claim of the Wabash that some undefined part of 6,500 cars per year (compared with a total volume of some 850,000 cars) could be "influenced" to Western. (R. 1270-1, 1292)

And even this possibility could occur only by improvement of the Forrest interchange (R. 1292, 1182), which could not occur without the voluntary cooperation of the Wabash. That the risk of this minute diversion from the huge Wabash System could be "extremely harmful" or wipe out the "public interest" in the comprehensive plan of Minneapolis for improvement of service is an absurdity at best. At the least it was incumbent upon the Commission to make a direct finding on the public interest issue, so that the reviewing court could see how this gadfly effect on the Wabash justified denial to the public of the new, improved service inherent in the Minneapolis application.

C. Basic to the denial of the Minneapolis application is the finding that its plan contemplated "the disappearance of Western as an *independent* and *neutral* connection". (emphasis supplied). That Western would cease to be independent whether sold to Minneapolis or to Pennsylvania-Santa Fe is self-evident. But there is not an iota of evidence that the *neutrality* of Western would be impaired by Minneapolis. The only evidence is to the contrary:

1. All the witnesses agreed that failure to respect neutrality would be "suicidal"—regardless of ownership of Western. (R. 483-4, 546, 572) Reprisal and retaliation render any favoritism self-defeating. This is a particularly effective economic sanction as to Minneapolis—a small carrier dependent exclusively on the Peoria gateway and, in a large measure, on bridge traffic.

2. Minneapolis would double the number of solicitation agencies for Western and add service routes and faster schedules. (R. 1185-7, 1179-82) Of necessity, carrier connections into and from Western would be enhanced by the enlarged volume.

3. The two men most keenly aware of the need for, and the scope of, the neutrality—the President of Western and the President of Pennsylvania—had endorsed the Minneapolis program for acquisition of Western. (R. 537-8, 977-8)

Coupling "neutrality" with the obvious matter of "independence" served to obscure the vast difference between them in fact and in the proof. Neither the court below nor this Court separated this coupled finding to look at the evidence as to each. As to any departure from neutrality, there is no proof whatever; all the evidence is to the contrary.

D. Neither Pennsylvania's competition-stifling motive nor the fiasco attendant upon its prior ownership of Western was subjected to either scrutiny or findings. The corrupt purpose was not mentioned by the Commission or this Court in purporting to test the "public interest". The prior ownership is recited without a word to suggest that the competitive self-interest of Pennsylvania, cited by McNear as the cause of Western's failure, has diminished in the slightest degree. Could anything be more material in judging "public interest" than the applicant's grossly destructive purpose or its prior misuse of the very same property?

Judicial review is robbed of meaning and the Congressional command for disclosure of findings and reasoning by administrative agencies is frustrated by the Court's opinion. If the public benefit from improved service need not be evaluated, if findings shown to be mathematically erroneous must be accepted, then this Court is saying that any decision by the Interstate Commerce Commission where it "considered" the issues, is conclusive.

## II.

The Court failed to notice that the Commission made no effort to accommodate the interest of employees, on the one hand, with the National Transportation Policy to foster economy and efficiency in transportation, on the other hand.

With one-half of railroad revenues today expended in wages, economies are necessarily accompanied by curtailment of employment. A proper "weighing" as directed by the statute requires

(1) an appraisal of the public benefits to be derived from the elimination of duplicate facilities and operations,

(2) the number of employees—not positions—to be displaced and the extent of protection afforded them, and

(3) the effect of the program on stability of employment.

Not one of these factors received consideration by the Commission. All that the report shows is the discontinuance of 256 excess positions. Whether 200 persons or only 2 would actually be displaced—after the absorption of excess employees in other positions—the Commission did not determine. Minneapolis had carried out a similar major readjustment with only 2 or 3 employees displaced—and they found ready employment by other carriers. (R. 1032-3) The Commission should have exercised its expertise function to determine the number of employees—not positions—that would be affected and to balance that number, with full consideration of the cushioning plans for absorption and compensation, against the public interest in economy and efficiency.

This Court notes, with satisfaction, that the Commission "did consider and discuss" the cushioning plans, and, accordingly, that findings on such items were unnecessary. But that easy disposition ignores the Commission's duty at least to evaluate the number of employees who might be displaced against the relative advantages of the large transportation economies. To discard the economy policy because it requires abandonment of positions would be like banning all surgical operations because they involve the loss of some blood. Like the surgeon, the Commission is obliged to strike a balance on a rational basis—and this must be disclosed for the scrutiny of the reviewing courts.

The failure of the Commission to discharge its statutory "weighing" function or to deal with public interest in efficiency and the elimination of waste condemns the report as contrary to law. The relationship of economies to employment is involved in every merger. If mere reduction in positions can block integration, then neither elimination of duplication nor consolidation of operations can have a meaningful future in the railroad industry, which so desperately needs just that relief.

### III.

The opinion overlooks the use by the Interstate Commerce Commission of three different yardsticks to measure the effect of traffic diversions. The standard is conveniently altered to sustain a conclusion in line with the Commission decision.

1. The possible diversion of traffic on Western under Pennsylvania-Santa Fe ownership, the Commission found, "would not jeopardize the maintenance of adequate transportation service by the objecting interven-



ing carriers". (R. 34) That statement conforms to the statutory standard of "public interest".

2. However, the diversion of traffic on Western by the Minneapolis improvement program was condemned as "extremely harmful to other carriers". (R. 32) The public interest concern not to jeopardize the maintenance of adequate transportation could hardly have been applied to the flimsy Wabash claims, so the Commission simply changed the yardstick.

3. Similarly, a further shift in criteria was made in considering the deliberate degrading of the Nemo connection to divert traffic from Minneapolis. Here a destruction of more than 5% of the Minneapolis revenues which would wipe out 35% of its net profit was brushed aside on the theory that Minneapolis could get the business without being competitive. The Commission took refuge in the assumption that the vulnerable traffic moved on Minneapolis for considerations other than service. (R. 36) And to warrant that theory, the Commission simply tore up the time schedules in the record.

The issue of traffic diversion provided an ideal setting for the application of a single, uniform yardstick. The adoption of differing yardsticks, each fashioned for the occasion, spells an utter lack of fairness and an absence of a truly comparative hearing.

#### IV.

The legislative history of section 10 of the Clayton Act (15 U. S. C. § 20) is misconceived in the Court's opinion. Moreover, no transaction tainted by a section 10 violation should be blessed with administrative and judicial sanction save under the most compelling circumstances.

The opinion reads into the section 10 legislative history a narrow purpose to protect the carrier against excessive price payments. This is at odds with the much more comprehensive aims expressed by the President and the Congress. Both saw the attack on interlocking directorates as striking at the concentration of economic power. Both hoped that the statute "will bring new men, new energies, new spirit of initiative, and new blood into the management of our business enterprises". By discouraging interlocking directors, the Congress sought to "open the field of industrial development and origination to scores of men." The goal was to "enrich the business activities of the whole country". (H. R. Rep. No. 627, p. 20, 63rd Cong. 2d Sess. (1914)) These quotations do not permit the limited, parsimonious application of the statute made by this Court. The Congress was seeking, not safeguards for individual carriers, but a dissolution of the hard core of concentrated power in our whole economy.

Nor does the impression that the Act was designed "to cover only a carrier's dealing with related persons in its own securities" (Opinion, p. 16, fn. 13) square with the legislative record. The initial House Bill did limit the restraint to dealing in the carrier's own securities. (H. R. Rep. No. 627, p. 3, 63rd Cong. 2d Sess. (1914)) The Senate Bill changed the phrase to the present comprehensive language which the conference report adopted. (S. Rep. No. 698, p. 64, 63rd Cong. 2d Sess. (1914)) That history leaves no doubt that the Congressional objective went well beyond the limits circumscribed in this Court's opinion.

Nor is it a mere "legal abstraction" to urge that condonation of a transaction condemned by law is not readily to be inferred. This Court has repeatedly denied to wrongdoers the fruits of their illegal conduct. A lesser respect

for law in determining "public interest" should not be expected from the Commission. And if sanctioned, it ought to be only for the most compelling considerations of public benefit. The issue is not solely, or even primarily, one of the Commission's power under section 5(11) of the Interstate Commerce Act (49 U. S. C. § 5(11)). Rather it is one of morality. It reaches the problem of when immunity should be granted and what showing the Commission must make to sustain such a grant of immunity when exposed to judicial review.

A re-examination of the section 10 issues is particularly appropriate in view of the lack of authoritative review by the District Court. That court so completely rewrote the statute that the government could not bring itself to defend that unfounded position. A hospitable consideration of the statute, with the broad-gauged legislative objectives, is called for in this Court, and for such consideration, a rehearing is required.

## V.

This Court failed to notice two major areas in which the Commission did not even attempt to accommodate the antitrust policy to the transportation policy.

A. The Commission did not consider, and this Court makes no reference to, the competitive gateway problem. That problem exists wholly apart from the question of the competitive effects on individual carriers. What is involved is the basic competition between the Peoria gateway and the principal gateways in Chicago and St. Louis. There is, in this respect, not the slightest conflict between the national policy promoting competition and the National Transportation Policy seeking to strengthen our trans-

portation system in the interest of commerce and national defense.

Building up the Peoria gateway, in competition with Chicago and St. Louis, assures to the nation the added facilities that by-pass the congestion and delay of the larger gateways. The more effective the competition, the stronger the Peoria route.

The issue requires a simple determination of which of the competing applicants has the greater incentive to foster Peoria routings in preference to Chicago and St. Louis. Is it Pennsylvania-Santa Fe who derive the long-haul and much larger revenue from Chicago and St. Louis, or is it Minneapolis which is dependent solely on the Peoria gateway? Should Western again be entrusted to Pennsylvania, its St. Louis and Chicago competitor, under whose prior ownership that strategic line fell into almost three decades of receivership?

What the Court failed to see was that both antitrust and the transportation policies support the wisdom of strengthening Western to compete most effectively with the Chicago and St. Louis gateways. Economic self-interest provides the greatest assurance in that respect. And Minneapolis can be expected, in its own interest, to maximize solicitation and service through Peoria, the only gateway to which it has access. A like incentive could hardly be attributed to Pennsylvania-Santa Fe, whose economics are in the contrary direction.

B. The promotion of the Peoria gateway by Pennsylvania-Santa Fe is inferred from their announced plan to place Chicago and Lomax and Chicago and Effner "on a parity—from a solicitation standpoint." (R. 34, Opinion, p. 14) What this Court overlooked is the fact that the successful applicants intend neither parity nor solicitation.

President Symes of Pennsylvania explained the situation and his intentions in the following words (R. 521-2):

"Q. Does the Pennsylvania solicit traffic via Effner [its connection with Western] as against St. Louis?

"A. No, we do not.

"Q. As against Chicago?

"A. Effner as against Chicago?

"Q. Yes.

"A. No, we do not.

\* \* \* \* \*

"Q. Mr. Symes, would your solicitation policies be changed in the event you acquire a 50 per cent interest in the T. P. & W.?

"A. Well, I prefer that Mr. Carpi answer that, but as president of the company I wouldn't think they would substantially change \* \* \* If somebody asked me in Philadelphia, I am going to ship a car of freight to California, I would say St. Louis, if you couldn't do it there but could at Chicago I'd say do that, if you couldn't do that at Chicago, give it to us at Effner, I'd say give it to us, I don't think it would change very much."

That authoritative testimony effectively gave the lie to any semblance of parity for the Western connection at Effner.

President Coulter of Western, the last witness for the successful applicants, similarly admitted that (1) Pennsylvania-Santa Fe would not solicit at all for Western through either Lomax on the West or Effner on the East (R. 1601, 1609), and (2) the new "parity" policy meant no help or assistance, but was synonymous with "a benevolent-attitude." (R. 1609)

We respectfully submit that the entire assurance of parity of solicitation is a semantic hoax designed to mislead

the Commission. Pennsylvania-Santa Fe sold the Commission a program that, in truth, spells no change in actual solicitation or service. Western will survive only to the extent that it fights successfully for its traffic against Chicago and St. Louis solicitation by its owners. This returns Western to the roller coaster headed right back to the impossible position of competing with its owners for traffic—a condition which McNear bluntly described as the cause of its hopeless failure. How this squares with the national policy for a strong transportation system or with the public interest is not revealed in the Commission report or the opinion of this Court. If this Court will recognize the significance of an available alternate course, it cannot allow this gamble with a strategic carrier's well-being to stand.

Much, much more than inequitable curtailment of the natural expansion of a small carrier and monopolistic enhancement of the power of two huge railroads is here involved. To permit this injustice in the name of the public interest, this Court must abandon the traditional restraint on arbitrary administrative action which systematic findings impose. At a time when the reputation of administrative agencies for even-handed justice has, under the glare of Congressional exposure, sunk to a new low, such judicial insistence upon administrative conformity to Congressional standards should not be relaxed. Nor should conclusions be afforded the gloss of untouchable expert opinions without systematic findings with at least some support in the record. In these circumstances the Court ought not to refuse to look at the record.

Wherefore, the plaintiff prays that a rehearing be granted and that upon such rehearing the judgment of the District Court be reversed.

Respectfully submitted,

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### **CERTIFICATE OF COUNSEL**

The undersigned does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN G. DORSEY



# SUPREME COURT OF THE UNITED STATES

Nos. 12, 27 AND 28.—OCTOBER TERM, 1959.

The Minneapolis & St. Louis  
Railway Company, Appellant,

12 v.

United States of America, et al.

State of South Dakota, et al.,  
Appellants,

27 v.

United States of America, et al.

State of Minnesota, et al., Appel-  
lants,

28 v.

United States of America, et al.

On Appeals From the  
United States Dis-  
trict Court for the  
District of Minne-  
sota.

[December 14, 1959.]

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

These appeals present questions arising out of rival applications by several rail carriers to the Interstate Commerce Commission under § 5 (2) of the Interstate Commerce Act<sup>1</sup> for authority to acquire control of Toledo, Peoria & Western Railroad Company.

<sup>1</sup> Section 5 (2) of the Interstate Commerce Act (24 Stat. 380, as amended, 54 Stat. 905, 49 U. S. C. § 5 (2)) provides, in pertinent part, that:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for . . . two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier . . . seeking authority therefor shall pre-

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"Western" is an independent, short-line "bridge carrier"<sup>2</sup> of through east-west traffic by-passing the congested Chicago gateway. Its line is about 234 miles long, extending from its connection with the Pennsylvania Rail-

sent an application to the Commission and thereupon the Commission shall notify [designated parties], and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected . . ."

<sup>2</sup> The term "bridge carrier" appears to mean a short-line carrier which transports through traffic from one long-line carrier to another

road Company ("Pennsylvania") at Effner, on the Illinois-Indiana state line, westward, through Peoria, to its connection with the main line of the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") at Lomax, Illinois, and thence southwesterly a short distance to Keokuk, Iowa. Its headquarters, shops and yards are located in East Peoria where it has 24 executives and where, and elsewhere along its line, it has about 225 other employees. It has connections for the interchange of traffic with 16 railroads, the principal ones being with the Pennsylvania at Effner, with the Santa Fe at Lomax, and with the New York, Chicago & St. Louis Railroad Company ("Nickel Plate"), the Illinois Terminal Railroad Company, the Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Minneapolis & St. Louis Railway Company ("Minneapolis") at Peoria. Its interchange connections with the other 10 railroads are at 17 other towns along its line.

Western has outstanding 90,000 shares of common capital stock, 82% of which is owned by the testamentary trustees of the estate of George P. McNear—Wilmington Trust Company and Guy Gladson—and the remaining 18% is owned by members of the McNear family, a bank and the president of Western. In 1954, the trustees determined to sell their Western stock, and rival efforts were commenced by Minneapolis, on the one hand, and by the Santa Fe and Pennsylvania, on the other hand, to purchase it. (Four of Wilmington Trust Company's directors were also directors of Pennsylvania.) Those negotiations culminated in a contract between the trustees and the Santa Fe, dated May 26, 1955, providing for the sale by the former and purchase by the latter of the stock at a price of \$135 per share, subject to the Commission's approval.<sup>3</sup> Soon afterward, like agreements

<sup>3</sup> During the negotiations, Minneapolis first offered \$69.50, and later \$80, per share for the stock. On April 15, 1955, the Santa Fe

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were made by the Santa Fe with the holders of the remaining 18% of the Western stock.

On June 28, 1955, the Santa Fe entered into a contract to sell to the Pennsylvania Company, a wholly owned subsidiary of Pennsylvania, 50% of the outstanding capital stock of Western at \$135 per share,\* subject to approval of the Commission.

and Pennsylvania each obtained letter commitments from the trustees for the sale to each of them of 26% of the Western stock at a price of \$100 per share. (Near the same time the Rock Island made a like offer to the trustees for 26% of the Western stock, but that offer was not accepted.) But a dispute arose—and apparently still exists—between the trustees and Pennsylvania—with respect to the validity of those commitments. Thereupon, Minneapolis offered the trustees \$133 per share for the Western stock, but that offer was not accepted, and on May 26, 1955, the Santa Fe, acting, as the Commission found, "on behalf of that carrier alone," agreed with the trustees for the sale by the former and purchase by the latter of all of the Western stock held by the trustees at a price of \$135 per share, and those parties on that date entered into a contract accordingly, subject to approval of the Commission.

\*The contract of June 28, 1955, between the Santa Fe and the Pennsylvania Company provided that it was without prejudice to any claims, causes of action or rights, which Pennsylvania may have against the trustees of the McNear estate with respect to the letter commitment of April 15, 1955, for the sale by the trustees to Pennsylvania of 26% of the Western stock; and that, in the event Pennsylvania should acquire from the trustees, under that letter commitment, all or any part of such shares, the obligation of the Santa Fe under the contract to sell Western shares to the Pennsylvania Company was to be reduced accordingly. It appears that litigation was then and is yet, pending by Pennsylvania against the trustees for the enforcement of the letter commitment of April 15, 1955.

The contract also contained a covenant which, in essence, provided that (1) "Western will continue to be operated as a separate and independent carrier with responsible management located along its line in order to preserve to shippers and communities the present direct access to its officials," (2) that Western's properties will be maintained and improved, (3) that Western "will continue to maintain its own solicitation forces and will be entirely free to solicit

On July 8, 1955, the Santa Fe and Pennsylvania Company and its parent, Pennsylvania, applied to the Commission under § 5 (2) of the Act<sup>5</sup> for approval of those stock purchase agreements and the consequent joint control of Western. The Minneapolis intervened and objected to the application, as did also the States of Minnesota and South Dakota and their respective public service regulatory commissions.

Thereafter, on October 13, 1955, the Minneapolis applied to the Commission, under the same section of the Act, for authority to acquire sole control of Western, expressing its willingness to enter into contracts with Western's stockholders to purchase their stock at the same price and on the same terms as set forth in their existing contracts with the Santa Fe. The Santa Fe, the Pennsylvania Company and Pennsylvania intervened in the latter proceeding and objected to the Minneapolis application.

On motion of Minneapolis, the Commission consolidated the two proceedings. Thereafter, seven other railroads having interchange connections with Western's line intervened. Two of them sought authority, at all events,<sup>6</sup>

traffic in such manner as best to serve the interests of Western."

(4) that all "existing routes and channels of trade via Western will be maintained and kept open without discrimination between connecting lines of railroad," and (5) that the Board of Directors of Western shall consist of 11 members, of whom one shall be the president of the company, two shall be officers of the Santa Fe, two shall be officers of the Pennsylvania Company, or Pennsylvania, or both, and the remaining six shall be prominent citizens not connected with either of the parties but selected by them through mutual agreement.

<sup>5</sup> See note 1.

<sup>6</sup> The New York, Chicago & St. Louis Railroad Company ("Nickel Plate") and the Chicago, Rock Island & Pacific Railroad Company ("Rock Island") sought authority, under § 5 (2) (d) of the Act (see note 1), to be included in the acquisition of Western's stock on an equal basis with the successful applicant or applicants.

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and two others of them sought authority, under stated conditions,<sup>7</sup> to participate, under § 5 (2)(d) of the Act, in the acquisition of the Western stock on an equal basis with the successful applicant. The State of Illinois, 18 cities or towns and seven chambers of commerce located on or along Western's line, two labor organizations representing Western's employees, and a large number of shippers over Western's line, intervened in support of the Santa Fe-Pennsylvania application and in opposition to the Minneapolis application.

After an extended consolidated hearing before him, the Commission's examiner issued a proposed report recommending approval of the Santa Fe-Pennsylvania application and dismissal of the Minneapolis application. Thereafter, upon exceptions, and briefs and arguments in their support, Division 4 of the Commission issued its report. It was confronted, as it said, with four alternative proposals, (1) for authorization of joint control of Western by the Santa Fe and Pennsylvania, (2) for

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<sup>7</sup> The Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Wabash Railroad Company ("Wabash") did not object to approval of the Santa Fe-Pennsylvania application, provided the order required continuation of present routes and channels of trade via existing junctions and gateways and of all existing traffic and operating relations and arrangements, but they asked, in the event any railroad other than the Santa Fe and Pennsylvania be authorized to acquire an interest in Western's stock, that they, too, be authorized to participate therein to the same extent as any such other railroad.

The Illinois Central Railroad Company ("Illinois Central"), the Gulf, Mobile & Ohio Railroad Company ("Gulf") and the Chicago & North Western Railway Company ("North Western") asked that, if either application be approved, the order be conditioned to require the maintenance of all routes and channels of trade via existing gateways. The Monon Railroad Company asked that if the Santa Fe-Pennsylvania application be approved, the order contain a requirement that Pennsylvania shall grant to it certain trackage rights, and, if not done, that the Santa Fe-Pennsylvania application be denied.

authorization of sole control by the Minneapolis, (3) for authorization of two other railroads, at all events, and of two more railroads, under stated conditions, to participate in the acquisition of the Western stock on an equal basis with the successful applicant," and (4) denial of both applications.

The Commission observed that "[t]hese proceedings represent a new and more complicated phase in the administration of § 5, since [they involve] 2 applications for authority to control the same property, and petitions by 4 other carriers for inclusion in the transaction under varying circumstances." It recognized that, under § 5 (2) of the Act and the National Transportation Policy,<sup>8</sup> it was required to "weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitions seeking such inclusion but also the other applicant and nonparticipating railroads as well." It thought that the burden of proof was "most heavy for an applicant in a proceeding like this, because it must not only overbalance the claims of those seeking to share in the control but also of those seeking to exclude it from the transaction." It conceived it to be its duty, under the Act and the National Transportation Policy, to "arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it."

The Commission found that the Santa Fe-Pennsylvania plan contemplates that Western "will continue to be operated as a separate and independent carrier with responsible management located along its line"; that it "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of Western," and that all

<sup>8</sup> See notes 6 and 7.

<sup>9</sup> 49 U. S. C., n. preceding § 1, 49 Stat. 543.



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"existing routes and channels of trade via Western will be maintained and kept open without discrimination between connecting lines of railroad." It found, on the other hand, that the Minneapolis plan "unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works; that "[f]or all practical purposes Western would be integrated, consolidated and merged into the Minneapolis for ownership, management and operation"; that features of the Minneapolis plan "would be extremely harmful to other carriers"; that Western's headquarters office at Peoria would be eliminated, leaving only a trainmaster and a roadmaster at that point, and that the employment of most of Western's 24 executives and 225 other employees would be severed.

The Commission further found that "[o]nly the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of Western as a separate and independent operating carrier," and that all other parties to, and intervenors in, the proceedings "insist that the separate and independent operation of Western under its present local management is a public necessity." It then found that the "[p]ublic interest demands that the present policies of Western in all respects be continued." It thereupon made the ultimate finding, required by § 5 (2) (b) of the Act, that the acquisition and plan of operation by the Santa Fe and Pennsylvania, subject to stated conditions, was "within the scope of § 5 (2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed [by them] are just and reasonable; and that the transaction will be consistent with the public interest." The Commission then entered its order approving the Santa Fe-Pennsylvania application, dismissing the Minneapolis application, and denying the petitions of the several inter-

vening railroads which sought to participate in the acquisition of the Western stock. 295 I. C. C. 523.

Thereafter, Minneapolis petitioned the whole Commission for a reconsideration, and alternatively requested that, if the approval of the Santa Fe-Pennsylvania application be permitted to stand, it be authorized to participate equally with those railroads in the purchase of Western's stock on the same terms. That petition was denied.

Minneapolis then timely filed a complaint in the District Court for Minnesota against the United States and the Interstate Commerce Commission to vacate the Commission's order. The States of Minnesota and South Dakota and their respective regulatory commissions, being interested in strengthening the Minneapolis which operates in those States, intervened in support of the complaint. The defendants answered, asserting the full legality of the Commission's order. The Santa Fe, the Pennsylvania, the Pennsylvania Company, the State of Illinois, the 18 cities and seven chambers of commerce and the numerous shippers who were intervenors before the Commission, intervened in opposition to the complaint. The Nickel Plate intervened, complaining that the Commission had improperly denied its request to participate in the purchase of the Western stock.

A three-judge court was convened and, after hearing, rendered its opinion and judgment sustaining the Commission's order. 165 F. Supp. 893. On separate appeals by the Minneapolis, the State of Minnesota and its regulatory commission, and the State of South Dakota and its regulatory commission, the case was brought here and we noted probable jurisdiction. 359 U. S. 933. All of those who were defendants and intervenors in opposition to the complaint in the District Court, except the Nickel Plate, are appellees in this Court.

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Minneapolis, supported by the States of Minnesota and South Dakota, contends, first, that the Commission improperly adopted at the outset of its report the standard of "separate and independent management" of Western as the criterion governing the comparative merits of the rival plans, which was antithetic to its application, and thereby deprived it of "fair comparative consideration," and that the District Court erred in approving the Commission's action.

The record does not support that contention. Rather, it shows that the Commission's governing standard was the "public interest," although it ultimately did find that the public interest would be best served by Western's continued operation as a "separate and independent carrier." We believe that the recited findings show that the Commission carefully "weighed" and considered "each application" in its labors to determine which, if either, of them was "consistent with the public interest." Its subsidiary findings (a) that the Minneapolis plan "unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works," (b) that certain features of the Minneapolis plan "would be extremely harmful to other carriers," (c) that the Minneapolis plan contemplates the elimination of Western's office and the separation of its employees and (d) that numerous witnesses insisted "that the separate and independent operation of Western under its present local management is a public necessity," fully support its conclusionary finding that the "[p]ublic interest demands that the present policies of Western in all respects be continued." That finding, though antithetic to Minneapolis' application, did not deprive it of "fair comparative consideration," but, on the contrary, it seems to us, was made by the Commission after full and fair consideration, and the District Court did not err in so holding.

Appellants' principal contention appears to be that acquisition of control of Western by Santa Fe and Pennsylvania will create a combination in restraint of commerce in violation of § 1 of the Sherman Act<sup>10</sup> and will lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act,<sup>11</sup> and that the Commission's approval of their application was an abuse of power.

On their face these contentions would seem to run in the teeth of the language and purpose of § 5 (11) of the Interstate Commerce Act. That section, in substance, provides that "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in . . . any transaction approved by the commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction . . . and any carrier . . . participating in a transaction approved or authorized under the provisions of this section shall [be] and [it is] hereby relieved from the operation of the anti-trust laws and all other restraints, limitations, and prohibitions of law . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." 24 Stat. 380, as amended, 54 Stat. 908, 49 U. S. C. § 5 (11).

Section 5 (11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act, and in terms relieves the acquiring carrier, upon approval by the Commission of the acquisition, "from the operation of the anti-

<sup>10</sup> 15 U. S. C. § 1, 26 Stat. 209.

<sup>11</sup> 15 U. S. C. § 18, 38 Stat. 731.

trust laws . . . .” Although § 5 (11) does not authorize the Commission to “ignore” the antitrust laws, *McLean Trucking Co. v. United States*, 321 U. S. 67, 80, there can be “little doubt that the commission is not to measure proposals for [acquisitions] by the standards of the anti-trust laws.” 321 U. S., at 85. The problem is one of accommodation of § 5 (2) and the antitrust legislation. The Commission remains obligated to “estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy.” 321 U. S., at 87.

Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest, “because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by ‘encouraging the organization of stronger units’ in the . . . industry. And in authorizing those [acquisitions] it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate [acquisitions] from the requirements of those laws. § 5 (11).” 321 U. S., at 85. It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. “Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.” 321 U. S., at 85-86.

As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in "the public interest." A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. "As has been said, this would render meaningless the exception relieving the participants in a properly approved [acquisition] of the requirements of those laws . . . ." 321 U. S., at 86. Resolution of the conflicting considerations "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the commission 'to the end that the wisdom and experience of that commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed [acquisition] is 'consistent with the public interest.' Cf. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *Pennsylvania Co. v. United States*, 236 U. S. 351; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344; *Purcell v. United States*, 315 U. S. 381." 321 U. S., at 87-88.

Here, the Commission gave extensive consideration to the anti-competitive contentions advanced by appellants, devoting more than five pages of its report to that matter. It found that "[a]ll the carriers endeavoring to participate in its control are in competition with Western"; that the "important thing is not whether there is competition, but whether there is probability of existing or potential competition being diminished or strangled by the Western under the control of the Santa Fe and the Pennsylvania." After an extended analysis of the complex facts and conflicting evidence, the Commission found that control of



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Western by the Santa Fe and Pennsylvania would not result in any significant lessening of competition. It pointed to the fact that although the Santa Fe's "long haul" is to Chicago and the Pennsylvania's "next to longest haul" is also to Chicago (its longest haul being to St. Louis) the Santa Fe has agreed, and is bound, "to place Lomax on a parity with Chicago from a solicitation standpoint, and . . . the Pennsylvania will recognize Effner as one of its principal interchanges along with Chicago and St. Louis"; that "there may be some diversion of traffic but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers."

The Commission also pointed to the fact that Western had been in a prolonged receivership until 1927 when George P. McNear acquired its stock at a receiver's sale. *Toledo, P. & W. R. Co. Acquisition*, 124 I. C. C. 181. It further found that Western's modern existence began at that time and, under the guidance of McNear, was built into a fine railroad; that since McNear's death, in 1947, the present management has continued with much success, the policies he established. Those policies, the Commission found, were, and are, "to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight [as a bridge] carrier through Peoria, an alternative route bypassing the congested terminals of Chicago and St. Louis," and that those policies are to be continued under the Santa Fe-Pennsylvania plan.

We think it is clear from this summary of its analysis and findings that the Commission fully estimated the scope and appraised the effects of any curtailment of competition which may result from the acquisition of Western by the Santa Fe and Pennsylvania, and, after having done so, concluded that their acquisition and plan of operation of Western would not result in any significant lessening



of competition. Congress has left the task of making that determination to the wisdom and experience of the Commission. The determination it has made rests upon adequate findings which are, in turn, supported by substantial evidence and is well within the limits of its discretion under the Act.

Appellants argue that the Pennsylvania, in actuality, contracted to purchase 50% of the Western stock from Wilmington Trust Company, a co-trustee of the McNear trust, and that since four persons were directors of both companies, that proposed stock purchase violates § 10 of the Clayton Act; that the Commission was without power to approve it; that, in any event, its action in "condoning" it was an abuse of power; and that the District Court, for those reasons also, erred in upholding the Commission's order.

The Commission found that the Santa Fe in entering into the contract of May 26, 1955, with the trustees of the McNear trust was "acting on behalf of that carrier alone." But even if we assume, for present purposes, that it was acting as well for the Pennsylvania the result must be the same. Section 10 of the Clayton Act prohibits a common carrier engaged in commerce from having "any dealings in securities" of more than \$50,000 in the aggregate, in any one year, "with another corporation, . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director [of] such corporation . . . except such purchases [as] shall be made . . . by competitive bidding under regulations to be prescribed by [the] commission." 38 Stat. 734, 15 U. S. C. § 20.

Section 10 of the Clayton Act is, of course, an anti-trust law,<sup>12</sup> and much of what we have just said relative

<sup>12</sup> It is clear that § 10 of the Clayton Act is included in the "anti-trust laws" referred to in § 5(11) of the Interstate Commerce Act. Section 1 of the Clayton Act, 15 U. S. C. (1952 ed.) § 12, provides

to the problem of accommodation of § 5 (2) of the Interstate Commerce Act and the antitrust laws is equally applicable to this contention. The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest.<sup>13</sup> But, even if this purchase of securities might, under other circumstances, violate § 10 of the Clayton Act, Congress, by § 5 (11) of the Interstate Commerce Act, has authorized the Commission to approve it if it finds that so doing is in the public interest. And Congress has expressly said that, upon such approval, the carrier shall be relieved "from the operation of the anti-trust laws . . . ." A contrary view would, in effect, permit the Commission to authorize only those stock purchases which would not, in the absence of § 5 (11), offend the antitrust laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws . . . ." *McLean Trucking Co. v. United States*, *supra*, at 86.

that "anti-trust laws," as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title." Moreover, § 5 (11) avoids any ambiguity by including "all other restraints, limitations and prohibitions of law, Federal, State or municipal."

The legislative history of § 10 of the Clayton Act, though meager, supports the view stated in the text. In fact, the language of the several drafts of § 10, together with the types of abuses cited in support of its enactment, suggest strongly that the words "dealing in securities" were intended to cover only a carrier's dealings with related persons in its own securities. See H. R. Rep. No. 627, 63d Cong., 2d Sess., p. 3; S. Rep. No. 698, 63d Cong., 2d Sess., pp. 47-48; S. Doc. No. 585, 63d Cong., 2d Sess., pp. 8-9; 51 Cong. Rec. 15943.

Here, the Commission fully considered the contracts under which the Pennsylvania<sup>a</sup> proposes to acquire a 50% interest in the Western stock and all other factors bearing on that matter and, after doing so, approved them. That action by the Commission did not exceed the statutory limits within which Congress has confined its discretion.

Minneapolis contends that § 5 (11) operates only *in futuro* and confers "no authority to purge the taint of a transaction illegal at the time it was brought to the commission." Whether there is merit in that contention, as a legal abstraction, we need not decide, for here the existing contractual arrangements through which Pennsylvania asks authority to acquire 50% of the Western stock look entirely to the future.<sup>b</sup> Neither the stock sale and purchase contract between the trustees and the Santa Fe nor the one between the Santa Fe and the Pennsylvania Company are consummated transactions, but both are expressly subject to, and will become effective only upon, approval by the Commission. Apart from criminal prosecutions with which we are not here concerned, it seems plain that approval of an acquisition by the Commission operates under § 5 (11), as that section says, to relieve the acquiring carrier "from the operation of the anti-trust laws . . . ."

Appellants next contend that the Commission violated § 8 (b) of the Administrative Procedure Act by failing to make findings which, they think, were compelled by the evidence.

There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission, *Riss & Co., Inc., v. United States*, 341 U. S. 907, and see *Chicago & Eastern Illinois R. Co. v. United States*, 344 U. S. 917.

The last sentence of § 8 (b) provides:

"All [administrative] decisions . . . shall become a part of the record and include a statement of (1) find-

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ings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." <sup>14</sup>

Upon the basis of that language, appellants argue that the Commission should have found that the price which the Santa Fe agreed to pay for the Western stock of \$135 per share was excessive. Though the Commission made no express finding upon that matter it did discuss it, pointing out that the certified value of Western's properties for ratemaking purposes was more than \$13,500,000; that it has no outstanding preferred stock and is relatively free of debt; that it has a fine earning record; that the transaction was at arm's length; that Minneapolis had offered \$133 per share for the stock within a few days of the time when the Santa Fe contracted for its purchase at \$135 per share, and that the Minneapolis sought authority in this proceeding to acquire the stock at the same price. The Commission concluded that if \$135 per share was a fair price for the one it was also for the other.

Upon the same basis, appellants also argue that the Commission should have found that the Minneapolis application was in the public interest in that its acquisition of Western would greatly strengthen both Minneapolis and Western by eliminating many duplicating facilities and by reducing operating expenses by more than \$1,770,000 annually. The Commission did not make a specific finding upon that matter, but it did give consideration to it and found that most of that saving—more than \$1,300,000 annually—would be at the expense of Western's employees—a matter which, because of the express command of clause 4 of § 5 (2)(c) of the Interstate Commerce Act (see note 1), it evidently thought was not consistent with the public interest. Appellants

<sup>14</sup> 60 Stat. 242, 5 U. S. C. § 1007 (b).

further argue that the Commission should have found that the Minneapolis plan afforded adequate protection to Western's employees by providing for their absorption into the Minneapolis as attrition among its own employees permitted. Again, although the Commission made no specific finding upon that contention it did consider and discuss it, and we think the law required no more.

Appellants challenge the Commission's failure to make a number of other subsidiary findings, all of which have been considered, but we find that they relate to contentions that are so collateral or immaterial that the law did not require specific findings upon them. By the express terms of § 8 (b), the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are "material." From a thorough examination of the record we are persuaded that the Commission has made adequate subsidiary findings upon all material issues and has made the ultimate findings required by § 5 (2), that they support the Commission's order, and are, in turn, supported by substantial evidence.

Finally, appellants contend that the District Court, because of inadequate subsidiary findings by the Commission, was unable to, or at least did not, afford it a proper judicial review, and merely "rubber stamped" the Commission's order. Whether or not we approve all of the reasons and legal conclusions of the District Court, it is clear that it fairly considered and decided all of the issues raised by appellants, accorded to them a full and fair judicial review, and reached a right result. Accordingly the judgment is

*Affirmed.*

MR. JUSTICE DOUGLAS dissents.